THOMAS PACK, INDIVIDUALLY; AND SUN CAB, INC., DBA NELLIS CAB COMPANY, A NEVADA CORPORATION, APPELLANTS, *v.* GARY LATOURETTE, M.D., INDIVIDUALLY, RESPONDENT.

No. 54537

May 31, 2012 277 P.3d 1246

Appeal from a district court order dismissing a third-party complaint, certified as final under NRCP 54(b), in a tort action. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

After injured motorist brought action against taxicab driver and his employer, employer brought third-party complaint against motorist's physician, asserting claims for equitable indemnity and contribution based on medical malpractice. The district court dismissed third-party complaint. Driver and employer appealed. The supreme court, PARRAGUIRRE, J., held that: (1) lack of preexisting relationship precluded equitable indemnity claim, (2) contribution claim prior to entry of judgment in underlying litigation was timely, and (3) failure to attach expert affidavit warranted dismissal of contribution claim without prejudice.

Affirmed in part, reversed in part, and remanded.

Rogers, Mastrangelo, Carvalho & Mitchell and *Charles A. Michalek* and *Daniel E. Carvalho*, Las Vegas, for Appellants.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno, for Respondent.

1. APPEAL AND ERROR.
   The supreme court will affirm the order of the district court if it reached the correct result, albeit for different reasons.
2. APPEAL AND ERROR.
   In considering an appeal from an order granting a motion to dismiss for failure to state a claim, the supreme court applies a rigorous, de novo standard of review. NRCP 12(b)(5).
3. APPEAL AND ERROR.
   In reviewing a district court's order granting a motion to dismiss for failure to state a claim, the supreme court accepts the plaintiff's factual allegations as true and then determines whether these allegations are legally sufficient to satisfy the elements of the claim asserted. NRCP 12(b)(5).
4. INDEMNITY.
   Lack of preexisting legal relationship between taxicab company and physician for injured motorist precluded company's third-party complaint for equitable indemnity against physician in underlying action by motorist against driver and company arising out of motor vehicle accident, where, although company alleged physician committed medical malpractice and worsened motorist's condition, company's liability in the underlying litigation was based upon claims of its own active negligence in causing the car accident.

5. INDEMNITY.
   Equitable indemnity, which allows a defendant to seek recovery from other potential tortfeasors, is generally available to remedy the situation in which the defendant, who has committed no independent wrong, is held liable for the loss of a plaintiff caused by another party.
6. INDEMNITY.
   In order for one tortfeasor to be in a position of secondary responsibility vis-a-vis another tortfeasor, and thus be entitled to indemnification, there must be a preexisting legal relation between them, or some duty on the part of the primary tortfeasor to protect the secondary tortfeasor.
7. INDEMNITY.
   Where a party has committed an independent wrong, and is thus actively negligent, that party has no right to indemnity from other tortfeasors.
8. CONTRIBUTION.
   Taxicab company's third-party contribution claim prior to entry of judgment in underlying litigation, a negligence action by motorist against company and driver alleging that motorist's physician exacerbated motorist's injuries by negligently mistreating motorist after motor vehicle accident, was timely; contribution statute permitted a party to enforce a claim of contribution either by a separate action following entry of judgment or in the same action in which the judgment was entered. NRS 17.225(1).
9. HEALTH.
   Taxicab company's failure to attach statutorily required medical malpractice expert affidavit with third-party contribution claim against injured motorist's physician, in which company alleged that physician exacerbated motorist's injuries by negligently mistreating motorist after motor vehicle accident, warranted dismissal of contribution claim without prejudice, rather than with prejudice; failure to attach the affidavit rendered the complaint void ab initio. NRS 41A.071.
10. HEALTH.
    If a party fails to file an expert affidavit with his or her complaint in a medical malpractice action, the complaint is void ab initio and must be dismissed.

Before DOUGLAS, GIBBONS and PARRAGUIRRE, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, after summarily concluding that the district court erroneously dismissed with prejudice a third-party complaint for equitable indemnity and contribution on statute of limitations grounds, we address three alternative arguments raised in the motion to dismiss. To begin, we discuss whether the claim for equitable indemnity fails as a matter of law based on the lack of any preexisting relationship between the third parties and the third-party plaintiffs' active negligence. Next, we address whether dismissal of a contribution claim is proper if the party seeking contribution has not yet paid toward a judgment. Finally, we consider

whether NRS 41A.071's expert affidavit requirement applies to claims for contribution that are based in medical malpractice.

As for the first argument, because there was no preexisting relationship between the parties in this case, and because the claims against the third-party plaintiffs were based on their active negligence, the equitable indemnity claim lacked merit and was properly dismissed. Second, we conclude that a party need not pay toward a judgment before bringing a claim for contribution. As such, the third-party contribution claim was not properly dismissed on that ground. Finally, we conclude that when a claim for contribution is contingent upon a successful showing of medical malpractice, a claimant must satisfy the expert affidavit requirement of NRS 41A.071. Thus, the third-party plaintiffs' failure to attach an expert affidavit warranted dismissal of their complaint, but such dismissal should have been without prejudice.

We therefore affirm the district court's order granting respondents' motion to dismiss, except to the extent that the third-party complaint was dismissed with prejudice.

FACTS AND PROCEDURAL HISTORY

In May 2006, David Zinni, who is not a party to this appeal, was injured in an automobile accident when his car was struck by a taxicab driven by appellant Thomas Pack, who was employed by appellant Sun Cab, Inc., d.b.a. Nellis Cab Company (collectively, Sun Cab). Zinni sought medical treatment for his injures from respondent Dr. Gary LaTourette and subsequently filed a personal-injury action against Sun Cab.

In Zinni's lawsuit against Sun Cab, he did not name LaTourette as a defendant, nor did he include any allegations of medical malpractice. During discovery, however, Sun Cab learned that LaTourette may have aggravated Zinni's injuries by negligently treating him after the accident. Consequently, Sun Cab sought to implead LaTourette and filed a third-party complaint, asserting claims for equitable indemnity and contribution based on LaTourette's alleged medical malpractice.

LaTourette moved to dismiss the third-party complaint, arguing that it was time-barred by NRS 41A.097, Nevada's statute of limitations for medical malpractice claims. LaTourette also argued that Sun Cab's underlying claims of equitable indemnity and contribution should be dismissed because, for various reasons, they failed as a matter of law. As an alternative ground for dismissal, LaTourette argued that Sun Cab had failed to attach an expert affidavit in support of its claims, as is required by NRS 41A.071 for medical malpractice complaints.

The district court ultimately concluded that Sun Cab's claims were time-barred by NRS 41A.097's medical malpractice statute of limitations. Consequently, the district court dismissed Sun Cab's complaint with prejudice and declined to address LaTourette's remaining arguments regarding the merits of Sun Cab's underlying claims and its failure to attach an expert affidavit. The dismissal order was certified as final under NRCP 54(b), and this appeal followed.

DISCUSSION

After this appeal was filed but before briefing began, this court issued an opinion in *Saylor v. Arcotta*, 126 Nev. 92, 225 P.3d 1276 (2010). In *Saylor*, we clarified that ''NRS 41A.097(2)'s limitations period does not apply to equitable indemnity and contribution claims,'' and that such claims are instead subject to the limitations periods laid out in NRS 11.190(2)(c) and NRS 17.285, respectively. *Id*. at 95, 225 P.3d at 1278-79.

Recognizing this distinction, Sun Cab contends on appeal that the district court's order to dismiss should be reversed, as Sun Cab's claims undisputedly were timely under NRS 11.190(2)(c) and NRS 17.285. LaTourette concedes that *Saylor* rendered the district court's reliance on NRS 41A.097 improper, but he contends that the district court's dismissal order can be affirmed based upon the alternative arguments he presented in district court. Namely, LaTourette argues that (1) the claim for equitable indemnity failed as a matter of law based on the lack of any preexisting relationship between the third parties and Sun Cab's active negligence; (2) the claim for contribution was premature, as there had been no payment toward a judgment; and (3) Sun Cab's failure to attach an expert affidavit warranted dismissal of its complaint.

Standard of review

[Headnotes 1-3]

''[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons.'' *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987). Whether we can affirm the dismissal of Sun Cab's equitable indemnity and contribution claims based on their lack of legal merit is, in essence, an inquiry into whether Sun Cab has pleaded claims for which relief can be granted. *See* NRCP 12(b)(5). In considering an appeal from an order granting a motion to dismiss for failure to state a claim, this court applies a rigorous, de novo standard of review. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 634-35, 137 P.3d 1171, 1180 (2006). In our review, we accept the plaintiff's

factual allegations as true and then determine whether these allegations are legally sufficient to satisfy the elements of the claim asserted. *Id*.

Thus, we first consider the legal merits of Sun Cab's underlying claims for equitable indemnity and contribution. Next, we consider to what extent Sun Cab's failure to file an expert affidavit with its complaint warranted dismissal.

Sun Cab failed to state a claim for equitable indemnity

[Headnote 4]

Sun Cab's third-party claim for equitable indemnity was essentially a demand that LaTourette reimburse Sun Cab for the damage it allegedly caused to Zinni in the car accident. This claim fails as a matter of law.

[Headnotes 5-7]

Equitable indemnity, which ''allows a defendant to seek recovery from other potential tortfeasors,'' is generally available to remedy the situation in which the defendant, ''who has committed no independent wrong, is held liable for the loss of a plaintiff caused by another party.'' *Rodriguez v. Primadonna Company*, 125 Nev. 578, 589, 216 P.3d 793, 801 (2009). Thus, Nevada's equitable indemnity law has long drawn a distinction between secondary and primary liability. '' '[I]n order for one tortfeasor to be in a position of secondary responsibility vis-a-vis another tortfeasor, and thus be entitled to indemnification, there must be a preexisting legal relation between them, or some duty on the part of the primary tortfeasor to protect the secondary tortfeasor.' '' *Doctors Company v. Vincent*, 120 Nev. 644, 654, 98 P.3d 681, 688 (2004) (quoting *Black & Decker v. Essex Group*, 105 Nev. 344, 346, 775 P.2d 698, 699-700 (1989)). Additionally, where a party has committed an ''independent wrong,'' and is thus actively negligent, that party has no right to indemnity from other tortfeasors. *See Rodriguez*, 125 Nev. at 589, 216 P.3d at 801; *see also Doctors Company*, 120 Nev. at 658, 98 P.3d at 690.

Here, LaTourette had no preexisting legal relationship with or other duty to protect Sun Cab's interests, and Sun Cab's liability in the underlying litigation is admittedly based upon claims of its own active negligence in causing the car accident. Accordingly, we affirm the district court's dismissal of Sun Cab's equitable indemnity claim, as there was no preexisting relationship between the parties and because Sun Cab was allegedly actively negligent in causing the underlying injuries. *See Rodriguez*, 125 Nev. at 590, 216 P.3d at 802; *Doctors Company*, 120 Nev. at 658, 98 P.3d at 690.

Sun Cab stated a claim for contribution

[Headnote 8]

Sun Cab's third-party contribution claim alleged that LaTourette exacerbated Zinni's injuries by negligently mistreating him after the car accident. Thus, by alleging that Sun Cab and LaTourette were joint tortfeasors in this regard, Sun Cab sufficiently pleaded a claim for contribution against LaTourette.

A right to contribution exists ''where two or more persons become jointly or severally liable in tort for the same injury to [a] person . . . even though judgment has not been recovered against all or any of them.'' NRS 17.225(1). LaTourette, however, relies upon NRS 17.225(2), which states that a right to contribution ''exists only in favor of a tortfeasor *who has paid* more than his or her equitable share of the common liability.'' (Emphasis added.) In other words, LaTourette contends that because Sun Cab had not yet ''paid'' Zinni more than its fair share of liability, the contribution claim was premature and should have been dismissed. We find this reasoning to be unpersuasive, as it squarely contradicts Nevada's Rules of Civil Procedure and several prior decisions of this court.

To begin, NRCP 14(a) provides that a third-party plaintiff may implead a third-party defendant based on an inchoate claim for contribution.[1] Specifically, NRCP 14(a) allows a third-party plaintiff to implead a third-party defendant ''who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim'' at ''any time after [the] commencement of the action.'' Under the federal analogue to NRCP 14(a), the phrase ''may be liable'' is meant to specifically provide for the possibility of joining a third-party defendant ''against whom a cause of action has not yet accrued.'' 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1451 (2010).

Moreover, we have repeatedly recognized that a third-party plaintiff has the right to seek contribution in an original action prior to entry of judgment. *See, e.g.*, *Rodriguez*, 125 Nev. at 583, 216 P.3d at 797 (defendants asserted prejudgment claims for contribution or indemnity in the original action); *ANSE, Inc. v. Dist. Ct.*, 124 Nev. 862, 868-69, 192 P.3d 738, 742-43 (2008) (noting that a third-party plaintiff could seek contribution from a third-party defendant in the original action prior to entry of judgment). We have also interpreted NRS 17.285 as setting forth two methods for enforcing a claim of contribution: either by a separate action

[1]To the extent that our recent decision in *Lund v. Dist. Ct.*, 127 Nev. 358, 362-63, 255 P.3d 280, 283-84 (2011), may be misconstrued, we take this opportunity to clarify that NRCP 14(a) is available for claims of contribution as well as indemnity.

following entry of judgment or ''*in the same action* in which [the] judgment is entered against two or more tortfeasors.'' *Bell & Gossett Co. v. Oak Grove Investors*, 108 Nev. 958, 963, 843 P.2d 351, 354 (1992) (emphasis added); *see* NRS 17.285(1), (2). Because this matter falls within the latter method, Sun Cab's claim for contribution was timely.

Accordingly, we conclude that Sun Cab's third-party claim for contribution was not premature, and thus, LaTourette's argument in this regard cannot serve as an alternative basis for affirming the district court's dismissal order.

Sun Cab's failure to attach an expert affidavit warranted dismissal, but without prejudice

[Headnote 9]

In the alternative, LaTourette argues that the district court reached the correct result in dismissing the contribution claim with prejudice based on Sun Cab's failure to attach an expert affidavit pursuant to NRS 41A.071. Sun Cab concedes that it did not attach an affidavit, but argues that the district court should have instead dismissed its complaint without prejudice. We agree with Sun Cab.

While this court has not yet considered the applicability of NRS 41A.071 to third-party claims for contribution, we have recognized that statutory limitations should apply to protect doctors from frivolous claims when a given action requires proof of malpractice before relief may be granted. *See Fierle v. Perez*, 125 Nev. 728, 738, 219 P.3d 906, 912 (2009) (applying the affidavit requirement to a claim of negligent supervision and explaining that malpractice statutes were intended ''to extend the legislative shield that protects doctors from frivolous lawsuits''); *see also Truck Ins. Exchange v. Tetzlaff*, 683 F. Supp. 223, 224-26 (D. Nev. 1988) (concluding that a former mandatory prerequisite for bringing a medical malpractice action extended to indemnity actions grounded in alleged medical malpractice).

Here, Sun Cab's complaint rested upon the theory that LaTourette's negligence had contributed to Zinni's injuries. In other words, to establish a right to contribution, Sun Cab would have been required to establish that LaTourette committed medical malpractice. Thus, Sun Cab is required to satisfy the statutory prerequisites in place for a medical malpractice action before bringing its contribution claim. *Fierle*, 125 Nev. at 736-38, 219 P.3d at 911-12.

[Headnote 10]

If a party fails to file an expert affidavit with his or her complaint in a medical malpractice action, the complaint is void ab initio and must be dismissed. *Washoe Med. Ctr. v. Dist. Ct.*, 122

Nev. 1298, 1304, 148 P.3d 790, 794 (2006) (''[A] medical malpractice complaint filed without a supporting medical expert affidavit is void ab initio, meaning it is of no force and effect. Because a complaint that does not comply with NRS 41A.071 is void ab initio, it does not legally exist . . . .'' (footnote omitted)). Notably, dismissal on this basis must be made ''without prejudice.'' NRS 41A.071.

Accordingly, because Sun Cab failed to attach an expert affidavit to its claim for contribution, the complaint in this regard was void ab initio and should have been dismissed without prejudice. *Id.*; *Washoe Med. Ctr.*, 122 Nev. at 1300, 148 P.3d at 792. Because the district court dismissed the contribution claim with prejudice, we reverse in part the district court's order.

CONCLUSION

The district court properly dismissed Sun Cab's claim for equitable indemnity for failure to state a claim. However, the district court's dismissal of Sun Cab's contribution claim cannot be affirmed on that basis, as payment toward a judgment is not a prerequisite to filing a contribution claim. Although Sun Cab was required to attach an expert affidavit to the contribution claim because it alleged medical malpractice, failure to do so merely warranted dismissal without prejudice. Consequently, we affirm the district court's order, except to the extent that it dismissed with prejudice, and we remand this matter to the district court with instructions to enter an order dismissing this case without prejudice.

DOUGLAS and GIBBONS, JJ., concur.

FGA, INC., DBA INSTANT REPLAY SPORTS PUB & GRILL AND CARMINE'S LITTLE ITALY; MELINO, LTD., DBA CARMINE'S LITTLE ITALY; CARMINE & ANN M. VENTO REVOCABLE TRUST, CARMINE VENTO AND ANN VENTO, TRUSTEES; AND CARMINE VENTO, INDIVIDUALLY AND DBA CARMINE & ANN M. VENTO REVOCABLE FAMILY TRUST, APPELLANTS, *v.* DEBBIE GIGLIO, RESPONDENT.

No. 54187

June 14, 2012 278 P.3d 490

Appeal from a district court judgment in a tort action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Customer brought premises liability action against sit-down restaurant. The district court entered a judgment on a jury verdict

for customer, and restaurant appealed. The supreme court, DOUGLAS, J., held that: (1) the general verdict rule did not apply on appeal, where customer raised only one theory of recovery, negligence, that was premised on multiple factual theories; (2) mode of operation instruction was not warranted, absent evidence that restaurant created an increased risk of a potentially hazardous condition by having its customers perform tasks traditionally carried out by employees; (3) the district court did not abuse its discretion by excluding references by restaurant to customer's preexisting condition; (4) the district court did not abuse its discretion by excluding evidence of customer's alcohol consumption; but (5) evidence of alcohol consumption by customer's date was admissible; and (6) evidence that restaurant had a restricted gaming license was admissible.

Reversed and remanded.

Lewis and Roca LLP and *Joel D. Henriod* and *Daniel F. Polsenberg*, Las Vegas; *Watson Rounds, P.C.*, and *Kelly G. Watson*, Las Vegas, for Appellants.

Mainor Eglet and *David T. Wall, Robert T. Eglet*, and *Robert M. Adams*, Las Vegas, for Respondent.

1. APPEAL AND ERROR; CONSTITUTIONAL LAW.
   The supreme court has a duty to decide actual controversies by a judgment that can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law that cannot affect the matter in issue before it.
2. APPEAL AND ERROR.
   The general verdict rule provides that, if a jury renders a general verdict for one party, and no party requests interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party.
3. APPEAL AND ERROR.
   The general verdict rule, which provides that if a jury renders a general verdict and no party requested interrogatories the supreme court will presume that the jury found every issue in favor of the prevailing party, does not apply where a party raises overlapping factual theories in support of one single claim.
4. APPEAL AND ERROR.
   The general verdict rule did not apply in restaurant's appeal of verdict for customer in customer's negligence action, though customer alleged alternate factual theories of negligent conduct and the jury rendered a general verdict, as customer raised only one theory of recovery which was negligence, there was no way on appeal to address which factual theory the jury based its verdict, and the general verdict rule did not apply when a jury rendered a verdict on a single negligence claim that was premised on multiple factual theories.
5. APPEAL AND ERROR.
   The supreme court reviews a district court's decision to give a jury instruction for an abuse of discretion or judicial error.

6. NEGLIGENCE.
   A business owes its patrons a duty to keep the premises in a reasonably safe condition for use.
7. NEGLIGENCE.
   Where a foreign substance causing a slip and fall is made to be on the floor by the business owner or one of its agents, then liability will lie, as a foreign substance on the floor is usually not consistent with the standard of ordinary care.
8. NEGLIGENCE.
   Where an owner's chosen mode of operation makes it reasonably foreseeable that a dangerous condition will occur, a store owner could be held liable for injuries to an invitee if the plaintiff proves that the store owner failed to take all reasonable precautions necessary to protect invitees from these foreseeable dangerous conditions.
9. NEGLIGENCE.
   The rationale underlying the mode of operation approach, under which a plaintiff in a premises liability action does not have to prove the defendant's knowledge of a particular hazardous condition if the plaintiff can prove that the nature of the defendant's business tends to create a substantial risk of the type of harm the plaintiff suffered, is that an owner of a self-service establishment has, as a cost-saving measure, chosen to have the customers perform tasks that were traditionally performed by employees.
10. NEGLIGENCE.
    Under the mode of operation approach in a premises liability action, if a customer who is performing a task traditionally performed by employees negligently creates a hazardous condition, the owner is charged with the creation of this condition just as he would be charged with the responsibility for negligent acts of his employees because it was the owner's choice of mode of operation that created the risk.
11. NEGLIGENCE.
    Under the mode of operation approach in a premises liability action, the plaintiff's burden to prove notice is not eliminated; instead, the plaintiff satisfies the notice requirement if he establishes that an injury was attributable to a reasonably foreseeable dangerous condition on the owner's premises that is related to the owner's self-service mode of operation.
12. NEGLIGENCE.
    Mode of operation instruction was not warranted, in negligence action customer brought against sit-down restaurant after she allegedly slipped on a greasy or oily substance on her way to the restroom, absent evidence that the restaurant created an increased risk of a potentially hazardous condition by having its customers perform tasks that were traditionally carried out by employees, or evidence that the handling of food in a particular area by restaurant's employees gave rise to a foreseeable risk of a regularly occurring hazardous condition for its customers similar to the condition that caused customer's injury.
13. APPEAL AND ERROR.
    A district court's evidentiary rulings are reviewed for an abuse of discretion.
14. DAMAGES.
    A prior injury or preexisting condition may be relevant to the issues of causation and damages in a personal injury action.
15. DAMAGES.
    In order for evidence of a prior injury or preexisting condition to be admissible in a personal injury action, a defendant must present by com-

petent evidence a causal connection between the prior injury and the injury at issue.

16. DAMAGES.

Unless it is readily apparent to a layperson, a defendant seeking to introduce evidence of a prior injury in a personal injury action generally must produce expert testimony demonstrating the relationship between the prior injury and the injury complained of, and why it is relevant to a fact of consequence.

17. EVIDENCE.

The test for competency of medical expert testimony depends on the purpose for which the testimony is offered; if medical expert testimony is offered to establish causation, it must be stated to a reasonable degree of medical probability, though if expert testimony is offered to contradict the party opponent's expert testimony, the offered testimony must only be competent and supported by relevant evidence or research.

18. EVIDENCE.

For defense expert testimony to constitute a contradiction of the party opponent's expert testimony, the defense expert must include the plaintiff's causation theory in his analysis.

19. EVIDENCE.

If a defense medical expert in a personal injury action does not consider the plaintiff's theory of causation at all, then the defense expert must state any independent alternative causes to a reasonable degree of medical probability because he or she then bears the burden of establishing the causative fact for the trier of fact; otherwise, the testimony would be incompetent not only because it lacks the degree of probability necessary for admissibility but also because it does nothing to controvert the evidence of the plaintiff.

20. EVIDENCE.

The district court did not abuse its discretion by excluding references by restaurant to customer's preexisting condition, in negligence action customer brought against sit-down restaurant after customer allegedly slipped on a greasy or oily substance on her way to the restroom, where none of restaurant's medical experts were able to testify to a reasonable degree of medical probability that customer's preexisting condition caused the injuries at hand. NRS 48.015, 48.035(1).

21. NEGLIGENCE.

Evidence of a party's possible intoxication may be probative of the issues of causation and comparative negligence; however, evidence of intoxication should not be admitted if there is no support for finding a causal link between the alleged impairment and the injury.

22. WITNESSES.

In addition to causation, evidence of intoxication is relevant to a person's ability to perceive and, thus, may be admissible to attack a witness on his or her ability to perceive and remember.

23. NEGLIGENCE.

The district court did not abuse its discretion by excluding evidence of customer's alcohol consumption, in negligence action customer brought against sit-down restaurant after customer allegedly slipped on a greasy or oily substance on her way to the restroom, where there was no indication that customer showed any signs of intoxication in the accident report filled out at the time of the accident or in the medical records from when customer was taken to the hospital after the fall. NRS 48.015, 48.035(1).

24. WITNESSES.

Evidence that customer's date had consumed alcohol was admissible, in negligence action customer brought against sit-down restaurant after

customer allegedly slipped on a greasy or oily substance on her way to the restroom, as the date was customer's key witness, date's consumption of alcohol was relevant to his ability to perceive whether there was a foreign substance on the floor, and there was no prejudice that would result from allowing evidence that a man of legal drinking age had consumed alcohol. NRS 48.015, 48.035(1).

25. WITNESSES.
The nature and extent that a party may present evidence to correct or change testimony rests largely in the discretion of the district court; however, the legal system has an interest in seeking the truth and encourages the correction of erroneous statements on the part of a witness.

26. WITNESSES.
Evidence from restaurant's gaming attorney and the Gaming Control Board that restaurant had a restricted gaming license rather than a nonrestricted gaming license was admissible, in negligence action customer brought against sit-down restaurant after customer allegedly slipped on a greasy or oily substance on her way to the restroom, though witness for restaurant initially testified that the restaurant had a nonrestricted license, as the restaurant's surveillance cameras were not operating when customer fell, establishments with nonrestricted gaming licenses were required to have operational surveillance cameras while establishments with restricted gaming licenses were not, and there was evidence that restaurant's witness who initially testified that the license was unrestricted was mistaken. NRS 48.025, 47.140, 47.150; NAC 5.160.

27. APPEAL AND ERROR.
A district court's denial of a motion for judgment as a matter of law is reviewed de novo.

28. TRIAL.
A motion for judgment as a matter of law may be granted if the opposing party failed to prove a sufficient issue for the jury so that the claim cannot be maintained under the controlling law; on a motion for judgment as a matter of law, the district court must view all evidence and inferences in favor of the nonmoving party. NRCP 50(a)(1).

29. LANDLORD AND TENANT.
A landlord is not liable for injury caused by the negligent actions of its tenant; however, a landlord is still subject to the duty of all persons to exercise reasonable care not to subject others to an unreasonable risk of harm.

30. APPEAL AND ERROR.
Reassignment of customer's negligence action against restaurant to a new district court judge after judgment for customer was reversed on appeal was not warranted, where restaurant failed to cite to any specific instances of judicial misconduct.

Before DOUGLAS, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we consider whether the ''mode of operation'' approach to premises liability, under which the plaintiff does not have to prove the defendant's knowledge of a particular hazardous condition if the plaintiff can prove that the nature of the defen-

dant's business tends to create a substantial risk of the type of harm the plaintiff suffered, extends beyond the self-service context. Because the mode of operation approach is premised on the idea that business owners should be held responsible for the risks that their choice to have customers serve themselves creates, we conclude that it does not extend to ''sit-down'' restaurants. Therefore, the district court abused its discretion by giving a mode of operation instruction in this case. We further conclude that the district court abused its discretion by excluding certain evidence. Therefore, we reverse and remand.

FACTS

This case involves respondent Debbie Giglio's June 2004 fall at Carmine's Little Italy, a ''sit-down'' restaurant, where servers attended to the needs of patrons, operated by appellant FGA, Inc. FGA is owned by appellant the Carmine and Ann M. Vento Revocable Trust (the Trust). The Trust is also FGA's landlord. Appellant Carmine Vento is the sole officer of FGA and a trustee of the Trust. Carmine's son, Frank Vento, is the president of FGA and the general manager of Carmine's Little Italy.

On the day of the fall, Giglio was on a date with her future husband, Raymond Schrefel. The two were at the restaurant for 45 minutes to an hour before the fall, during which time they consumed four beers and two glasses of wine. Schrefel later indicated that he thought that he and Giglio consumed two beers each and that he had consumed the two glasses of wine. Giglio was on her way to the restroom when she fell. She claimed to have slipped on a greasy or oily substance. Schrefel did not see the fall but corroborated the fact that there was an oily substance on the floor. However, the managers who assisted Giglio after she fell stated that the floor was clean and that she fell without slipping. Although the restaurant had video surveillance cameras, no video footage of the fall was available because the camera system was inoperable on the night in question.

After the fall, Giglio had an intervertebral disc removed in her neck and two discs removed in her lower back. Giglio required pain medications and extensive physical therapy, resulting in medical damages of over $400,000. Giglio's pain was not alleviated by her surgeries, and she claims that in the future, she will need a spinal stimulator and injections for pain management.

Giglio filed suit in district court against FGA and the Trust (collectively, FGA) alleging negligence and requesting over $3.3 million in damages.

Giglio filed a motion in limine to exclude evidence of her prior and subsequent accidents and injuries because they were not causally related to the injuries sustained in the accident, which the district court granted. During the 11 years prior to her fall, Giglio

had seen several doctors about moderate to severe back pain. Giglio had been taking prescription pain medications consistently from 1997 through 2004, when her fall occurred. These medications were for pain in her upper back. However, Giglio had also been treated for pain in her lower back.

Giglio filed a motion in limine to exclude evidence of her alcohol consumption on the night of the fall, arguing that there was no basis to infer that she was intoxicated when she fell. The district court granted the motion. During trial, FGA attempted to question Schrefel about his alcohol consumption on the night of Giglio's fall. Giglio objected, and the district court sustained the objection.

When the fact that there was no surveillance video of Giglio's fall became an issue at trial, Giglio requested that the district court take judicial notice of Nevada Gaming Regulation 5.160, which requires *nonrestricted* gaming licensees to maintain operable video surveillance equipment.[1] However, FGA had a *restricted* gaming license, so this regulation did not apply to it. The district court took judicial notice of the regulation but did not allow FGA to present certain evidence to clarify that the regulation did not apply to it.

After the close of Giglio's evidence, FGA moved for judgment as a matter of law under NRCP 50(a), arguing that the Trust, as a mere landlord, cannot be held liable for physical harm caused by a dangerous condition on the premises. The motion was denied, and the trial proceeded.

The jury was instructed on alternative theories of negligence. The instructions stated that FGA was negligent if Giglio's slip and fall was caused by a foreign substance on the floor that FGA or one of its employees (1) caused to be on the floor, or (2) had actual or constructive notice of and failed to remedy. The jury was additionally instructed on the ''mode of operation'' approach to premises liability, in which notice (*i.e.*, of a ''food hazard'') is established by proof that an injury resulted from a reasonably foreseeable dangerous condition related to the nature of the owner's business, or mode of operation, such as self-service.[2] *Sheehan v.*

---

[1]Frank Vento incorrectly testified that FGA had a nonrestricted gaming license.

[2]Jury instruction 33 read:

> Plaintiff does not have to establish Defendants had actual or constructive knowledge of the food hazard and Defendants are negligent for Plaintiff's injuries and harms if:
>
> 1. Food, butter or oils are commonly found in Defendants' restaurant;
> 2. It is continuous or easily foreseeable that food, butter or oil spilled in the area of the restaurant where the Plaintiff fell;
> 3. Plaintiff slipped and fell on food, butter or oil; and
> 4. Defendants could have inspected and cleaned the area of the restaurant in a more frequent and competent manner.

Roche Bros. Supermarkets, Inc., 863 N.E.2d 1276, 1283 (Mass. 2007). Over FGA's objection, the district court allowed the instruction.[3]

The jury found that FGA was 51 percent negligent and Giglio was 49 percent at fault. No interrogatories were given to the jury for it to indicate under which theory of liability it found FGA to be negligent. The jury awarded damages of $5,551,435, which the court reduced by 49 percent. The court entered a $3,526,545.19 judgment against FGA, which included costs, attorney fees, and prejudgment interest. FGA timely filed this appeal.

DISCUSSION

On appeal, FGA argues that (1) the district court abused its discretion by giving a ''mode of operation'' instruction in a case involving a fall in a sit-down restaurant; (2) the district court abused its discretion by excluding evidence of Giglio's preexisting injuries, evidence of alcohol consumption, and evidence to clarify the applicability of a gaming regulation; and (3) the district court erred by denying the motion for judgment as a matter of law.

We conclude that the district court abused its discretion by giving the mode of operation instruction and by excluding evidence of Schrefel's alcohol consumption and evidence to clarify the applicability of the gaming regulation. However, we find no error in the district court's evidentiary rulings regarding preexisting injuries or Giglio's alcohol consumption. We further conclude that the basis for its denial of the motion for judgment as a matter of law no longer exists. Accordingly, we reverse and remand.

Mode of operation jury instruction

FGA argues that the district court abused its discretion by giving a ''mode of operation'' jury instruction. Giglio counters that the instruction was proper. In examining these arguments, we will first address whether they are rendered moot by the general verdict rule. Concluding that they are not, we then consider the applicability of mode of operation liability.

The general verdict rule

Giglio asserts that FGA's mode of operation argument is moot because the mode of operation instruction provided merely an alternative basis for liability. Giglio contends that she alternatively argued that the spillage was caused by an employee and that FGA

---

[3]The district court previously excluded FGA's proffered testimony regarding absence of prior falls and the restaurant's cleaning standards and procedures, which would have been relevant to whether FGA could have ''inspected and cleaned the area of the restaurant in a more frequent and competent manner.''

is liable for the negligent acts of its agents; therefore, the mode of operation argument is rendered superfluous by the general verdict rule, which would require this court to presume that the jury found every issue in Giglio's favor. FGA urges this court to follow the lead of Connecticut courts, which have held that the general verdict rule does not apply where a party raises overlapping factual theories in support of one single claim.[4]

[Headnote 1]

This court has a duty '' 'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it.' '' *University Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004) (quoting *NCAA v. University of Nevada*, 97 56, 57, 624 P.2d 10, 10 (1981)). Here, if the judgment may be upheld under the general verdict rule, this court need not consider FGA's arguments relating to the mode of operation approach because they will have been rendered moot.

[Headnote 2]

The ''general verdict rule provides that, if a jury renders a general verdict for one party, and no party requests interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party.'' *Curry v. Burns*, 626 A.2d 719, 721 (Conn. 1993). In *Skender v. Brunsonbuilt Construction & Development Co.*, this court recognized this rule, citing to cases from Connecticut, which have dealt with the general verdict rule in depth and outlined the situations in which the general verdict rule applies. 122 Nev. 1430, 1438, 148 P.3d 710, 716 (2006).

Connecticut courts have further held that the general verdict rule is inapplicable where a jury renders a verdict on a single negligence claim that is premised on multiple *factual* theories. *See Curry*, 626 A.2d at 721; *Green v. H.N.S. Management Co., Inc.*, 881 A.2d 1072, 1076-77 (Conn. App. Ct. 2005). These courts have reasoned that '' 'various grounds of negligence alleged are often so interlocked as to make it difficult to consider them separately, and formulating interrogatories to obtain separate findings on the various claims would complicate the work of court, jury and counsel,' '' and that it is '' 'sounder policy to permit an appellant to take advantage upon appeal of errors affecting one specification

[4]FGA alternately argues that, even if the general verdict rule applies, there is no evidence in the record to support a finding that an employee spilled the substance upon which Giglio alleges she slipped and fell. While Giglio failed to properly cite to the record in support of this claim, *see* NRAP 28(e)(1), the record does contain some evidence that the jury could have considered to reach a conclusion that FGA's employees caused any spillage.

of negligence only, even though no interrogatories have been submitted.' '' *Green*, 881 A.2d at 1076-77 (quoting *Ziman v. Whitley*, 147 A. 370, 373 (Conn. 1929)).

[Headnotes 3, 4]

We now adopt the sound reasoning of the Connecticut courts and clarify that the general verdict rule is inapplicable in cases where overlapping factual theories support a single theory of recovery. Here, although Giglio alleged alternate factual theories of negligent conduct, she raised only one theory of recovery—negligence—and the general verdict rule is not properly applied in situations where a jury renders a verdict on a single negligence claim that is premised on multiple factual theories. This takes into account the fact that, where a general verdict is rendered without interrogatories, there is no way to know on which factual theory the jury based its verdict. We therefore address FGA's mode of operation argument.

The applicability of a ''mode of operation'' instruction

FGA argues that the district court abused its discretion by instructing the jury on mode of operation liability because it applies only in the context of a self-service establishment. Giglio argues that mode of operation liability extends beyond the self-service context.

[Headnote 5]

This court reviews a district court's decision to give a jury instruction for an abuse of discretion or judicial error. *Skender*, 122 at 1435, 148 P.3d at 714.

[Headnotes 6, 7]

''[A] business owes its patrons a duty to keep the premises in a reasonably safe condition for use.'' *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322 (1993). Where a foreign substance causing a slip and fall is made to be on the floor by the business owner or one of its agents, then ''liability will lie, as a foreign substance on the floor is usually not consistent with the standard of ordinary care.'' *Id.* Traditionally, where a foreign substance causing a slip and fall results from ''the actions of persons other than the business or its employees, liability will lie only if the business had actual or constructive notice of the condition and failed to remedy it.'' *Id.* at 250, 849 P.2d at 322-23. However, there is a modern trend toward modifying this traditional approach to premises liability to accommodate newer merchandising techniques, such as the shift that grocery stores have made from clerk-assisted to self-service operations. *Sheehan*, 863 N.E.2d at 1281-82.

[Headnotes 8-10]

One such variation is the ''mode of operation'' approach. *Id*. at 1282. This approach focuses on the nature of the business at issue. *Id*. at 1282-83.

> [W]here an owner's chosen mode of operation makes it reasonably foreseeable that a dangerous condition will occur, a store owner could be held liable for injuries to an invitee if the plaintiff proves that the store owner failed to take all reasonable precautions necessary to protect invitees from these foreseeable dangerous conditions.

Id. at 1283. The rationale underlying the mode of operation approach is that an owner of a self-service establishment has, as a cost-saving measure, chosen to have his customers perform tasks that were traditionally performed by employees. *Ciminski v. Finn Corporation, Inc.*, 537 P.2d 850, 853 (Wash. Ct. App. 1975). If a customer who is performing such a task negligently creates a hazardous condition, the owner is ''charged with the creation of this condition just as he would be charged with the responsibility for negligent acts of his employees'' because it was the owner's choice of mode of operation that created the risk. *Id*.

[Headnote 11]

Under the mode of operation approach, ''the plaintiff's burden to prove notice is not eliminated. Instead, the plaintiff satisfies the notice requirement if he establishes that an injury was attributable to a reasonably foreseeable dangerous condition on the owner's premises that is related to the owner's self-service mode of operation.'' *Sheehan*, 863 N.E.2d at 1283. There is a strong modern trend toward recognizing some form of a mode of operation rule, although most jurisdictions have applied it narrowly. *See Fisher v. Big Y Foods, Inc.*, 3 A.3d 919, 928 n.21 (2010) (noting that 22 jurisdictions have adopted some variation of the mode of operation rule, and that the majority of the jurisdictions adopting it have applied it narrowly).

In *Sprague v. Lucky Stores, Inc.*, this court implicitly adopted the mode of operation approach[5] in reversing an order granting

---

[5]Some jurisdictions have declined to adopt the mode of operation approach, suggesting that it imposes strict liability on business owners, making them ''absolute insurers'' for the safety of their customers. *Sheehan*, 863 N.E.2d at 1285. They instead apply the ''recurrent risk'' approach, where ''[i]f the owner of the premises has taken precautions reasonably necessary to protect its customers, then the owner is not liable to customers injured on the premises.'' *Dumont v. Shaw's Supermarkets, Inc.*, 664 A.2d 846, 849 n.1 (Me. 1995).

Nevada has not explicitly adopted either approach. Based on *Sprague*, some categorize it among the states that apply the recurrent risk approach, while others treat it as a mode of operation jurisdiction. *See Sheehan*, 863

summary judgment in favor of Lucky. 109 Nev. at 251, 849 P.2d at 323. There, the plaintiff slipped and fell on a smashed grape left on the floor of the produce department in a Lucky grocery store. *Id.* at 249, 849 P.2d at 322. The plaintiff offered no evidence indicating that Lucky was responsible for the grape's presence on the floor or that it had actual knowledge of the grape's presence on the floor; therefore, under the traditional approach to premises liability, the plaintiff was required to prove that Lucky had constructive notice of the grape's presence on the floor in its produce department. *Id.* at 250, 849 P.2d at 323. This court stated that even in the absence of constructive notice, ''a jury could conclude that Lucky should have recognized the impossibility of keeping the produce section clean by sweeping'' alone. *Id.* at 251, 849 P.2d at 323. Further, this court stated that sufficient evidence was presented ''to justify a reasonable jury in concluding that Lucky was negligent in not taking further precautions, besides sweeping, to diminish the chronic hazard posed by the produce department floor.'' *Id.* However, *Sprague* dealt with a self-service produce section in a supermarket; therefore, the court did not address whether such an analysis would extend beyond the self-service context.

[Headnote 12]

Keeping the rationale underlying the mode of operation approach in mind, we hold that mode of operation liability does not generally extend to a sit-down restaurant such as Carmine's Little Italy. Respondent failed to show that the handling of food in a particular area by employees of Carmine's Little Italy gave rise to a foreseeable risk of a regularly occurring hazardous condition for its customers similar to the condition that caused the injury. We find no reason to extend mode of operation liability to such establishments absent such a showing as their owners have not created the increased risk of a potentially hazardous condition by having their customers perform tasks that are traditionally carried out by employees. Accordingly, we conclude that the district court abused its discretion by giving a mode of operation instruction.[6]

Evidentiary rulings

FGA argues that the district court erred by excluding evidence of Giglio's preexisting injuries, evidence of Giglio's alcohol con-

---

N.E.2d at 1285; *Kelly v. Stop and Shop, Inc.*, 918 A.2d 249, 258-59 (Conn. 2007). However, while they may have different labels, both the ''recurrent risk'' and ''mode of operation'' approaches involve essentially the same analysis: to determine whether owners are liable to injured patrons by analyzing whether there was a ''recurrent'' or ''continuous'' risk on the premises associated with a chosen mode of operation. *Sheehan*, 863 N.E.2d at 1285.

[6]The parties make further arguments regarding the proper application of mode of operation liability; however, because we conclude that mode of operation liability does not apply here, we need not address these arguments.

sumption, and the potential applicability of gaming regulations to FGA. The district court did not abuse its discretion with respect to Giglio's preexisting injuries and alcohol consumption, but we agree with FGA as to the evidence clarifying the applicability of the gaming regulations.

[Headnote 13]

We review a district court's evidentiary rulings for an abuse of discretion. *M.C. Multi-Family Dev. v. Crestdale Assocs.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). All relevant evidence is admissible at trial unless otherwise excluded by law or the rules of evidence. NRS 48.025. Evidence is relevant if it has ''any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'' NRS 48.015. Relevant evidence may be excluded if, among other things, its ''probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.'' NRS 48.035(1).

Preexisting back condition

FGA argues that the district court abused its discretion in excluding evidence of Giglio's preexisting back condition. It claims that this evidence was relevant to its arguments regarding causation and damages. Specifically, FGA contends that it may attack Giglio's theory of causation without affirmatively proving an alternative. Giglio counters that the district court properly excluded evidence of her preexisting back condition because FGA's experts did not meet Nevada's certainty requirement for expert opinion testimony.

[Headnote 14]

A prior injury or preexisting condition may be relevant to the issues of causation and damages in a personal injury action. *Voykin v. Estate of DeBoer*, 733 N.E.2d 1275, 1279-80 (Ill. 2000); *see also Prichard v. Veterans Cab Company*, 408 P.2d 360, 364 (Cal. 1965).

[Headnotes 15, 16]

In order for evidence of a prior injury or preexisting condition to be admissible, a defendant must present by competent evidence a causal connection between the prior injury and the injury at issue. *McCormack v. Andres*, 185 P.3d 973, 977 (Mont. 2008) (''The party seeking to introduce alternate causation evidence must demonstrate a causal connection between the present symptoms complained of and a prior accident.''); *Voykin*, 733 N.E.2d at 1279-80 (''[F]or a prior injury to be relevant to causation, the injury must make it less likely that the defendant's actions caused any of the plaintiff's injuries or an identifiable portion thereof.'');

Allendorf v. Kaiserman Enterprises, 630 A.2d 402, 407 (N.J. 1993) (''A party seeking to present evidence of a prior injury or condition relating to an issue of medical causation must show that the evidence has some 'logical relationship to the issue in the case.' '') Moreover, unless it is readily apparent to a layperson, a defendant seeking to introduce evidence of a prior injury generally must produce expert testimony demonstrating the relationship between the prior injury and the injury complained of, and why it is relevant to a fact of consequence. *Voykin*, 733 N.E.2d at 1280.

[Headnotes 17-19]

The test for competency of medical expert testimony depends on the purpose for which the testimony is offered. *Williams v. Dist. Ct.*, 127 Nev. 518, 530, 262 P.3d 360, 368 (2011). If medical expert testimony is offered to establish causation, it ''must be stated to a reasonable degree of medical probability.'' *Id.* However, if expert testimony is offered to contradict the party opponent's expert testimony, the offered testimony must only be ''competent and supported by relevant evidence or research.'' *Id.* However, for defense expert testimony to constitute a contradiction of the party opponent's expert testimony, the defense expert must include the plaintiff's causation theory in his analysis. *Id.*

> If the defense expert does not consider the plaintiff's theory of causation at all, then the defense expert must state any independent alternative causes to a reasonable degree of medical probability because he or she then bears the burden of establishing the causative fact for the trier of fact. Otherwise, the testimony would be ''incompetent not only because it lacks the degree of probability necessary for admissibility but also because it does nothing to controvert the evidence of appellants.''

Id. (quoting *Stinson v. England*, 633 N.E.2d 532, 538 (Ohio 1994)).

[Headnote 20]

Here, the district court excluded all references to Giglio's preexisting back condition because it concluded that Giglio's prior injuries were ''remote in time'' and/or involved body parts that were ''unrelated'' to the injuries at issue. A review of the record shows that FGA proffered expert testimony that indicated that some or all of the treatment Giglio received after her fall could be attributed to her preexisting condition; however, none of the experts were able to testify to a reasonable degree of medical probability that her preexisting condition caused the injuries at hand. Because this testimony was proffered to establish causation, it

failed to meet the appropriate standard. Accordingly, we conclude that the district court did not abuse its discretion in excluding evidence of Giglio's prior back condition.

Alcohol consumption

FGA argues that the district court erred by excluding evidence that Giglio and Schrefel consumed alcohol prior to Giglio's fall. Giglio contends that the district court properly excluded the evidence because of lack of foundation, danger of confusion, misleading the jury, and the interjection of collateral issues.

[Headnotes 21, 22]

Evidence of a party's possible intoxication may be probative of the issues of causation and comparative negligence. *See VanHercke v. Eastvold*, 405 N.W.2d 902, 906 (Minn. App. 1987). Evidence of intoxication, however, should not be admitted if there is no support for finding a causal link between the alleged impairment and the injury. *Holderer v. Aetna Cas. and Sur. Co.*, 114 Nev. 845, 852-53, 963 P.2d 459, 464 (1998). In addition to causation, evidence of intoxication is also relevant to a person's ability to perceive and, thus, may be ''admissible to attack a witness on [his or] her ability to perceive and remember.'' *See State v. Orantez*, 902 P.2d 824, 828 (Ariz. 1995).

[Headnote 23]

In this case, the parties offered conflicting testimony as to whether Giglio's fall could have been caused by intoxication. FGA offered testimony that one witness who interacted with Giglio observed that he smelled alcohol on her breath and that she had slurred speech. Schrefel, Giglio's key witness, testified that Giglio had two beers within 45 minutes of the fall. However, there is no indication that Giglio showed any signs of intoxication in the accident report filled out at the time of the accident or in the medical records from when Giglio was taken to the hospital after the fall.

The transcript of the motion in limine hearing shows that the district court concluded that there was insufficient evidence to show that Giglio was intoxicated. In particular, the court noted that if there was an issue of intoxication, it would have been reported by the emergency medical team that responded. We detect no abuse of discretion in the district court's decision to exclude evidence of Giglio's alcohol consumption.

[Headnote 24]

However, we conclude that the district court abused its discretion by excluding evidence that Giglio's key witness, Schrefel, consumed alcohol. Evidence regarding Schrefel's alcohol consumption is relevant to his ability to perceive whether there was a foreign

substance on the floor. Additionally, we can see no prejudice that would result from allowing evidence that a man of legal drinking age had consumed alcohol. Accordingly, evidence of Schrefel's alcohol consumption should be admitted at any new trial to assist the jury in determining whether Schrefel was a reliable eyewitness.

Nevada Gaming Regulation 5.160

FGA argues that the district court erred by taking judicial notice of Nevada Gaming Regulation 5.160, which requires those establishments with a nonrestricted gaming license to have operational surveillance cameras. FGA further argues that the district court abused its discretion by permitting Giglio to present evidence of the regulation while not permitting FGA to present rebuttal evidence that the regulation did not apply to it because it only held a restricted gaming license. Giglio contends that FGA failed to object on the grounds it now asserts on appeal and that FGA was permitted to testify that it held a restricted license and was not subject to the regulation and, therefore, any error was harmless.

[Headnote 25]

The nature and extent that a party may present evidence to correct or change testimony rests largely in the discretion of the district court. *See Turtenwald v. Aetna Casualty & Surety Co.*, 201 N.W.2d 1, 8 (Wis. 1972). However, the legal system has an interest in seeking the truth and encourages the correction of erroneous statements on the part of a witness. *See Ex parte Keizo Shibata*, 35 F.2d 636, 637-38 (9th Cir. 1929).

[Headnote 26]

Here, Giglio requested that the district court take judicial notice of Nevada Gaming Regulation 5.160, which requires nonrestricted gaming licensees to maintain operable video surveillance. Prior to Giglio's request, Frank Vento, testifying as the person most knowledgeable for FGA, stated that FGA held a nonrestricted gaming license. The district court properly took judicial notice of Nevada Gaming Regulation 5.160. *See* NRS 47.140; NRS 47.150. However, after the district court took judicial notice of the gaming regulation, FGA informed the court that Frank Vento's testimony regarding whether FGA held a restricted or nonrestricted gaming license was incorrect. FGA offered both the testimony of the attorney who represented FGA before the Gaming Control Board and a fax from the Gaming Control Board indicating that the license in question was a restricted gaming license. The district court excluded the evidence and only allowed Carmine Vento, one of the holders of the license, to testify that the license was a restricted license. The court then permitted Giglio to argue that FGA's witnesses lacked credibility because they contradicted each

other and that there was no way to know what type of license FGA possesses because it was never produced.[7]

In light of the incorrect statements that FGA had a nonrestricted license, the fact that a nonrestricted licensee is required to have a functioning video surveillance system on the premises, and the subsequent arguments made by Giglio, we conclude that the district court abused its discretion in excluding this evidence. *See* NRS 48.025.

Denial of motion for judgment as a matter of law for appellant Carmine Vento and Ann M. Vento Revocable Family Trust

FGA argues that the district court erred by denying its motion for judgment as a matter of law as to the Trust because a mere landlord cannot be held liable for physical harm caused by a dangerous condition on the premises. Giglio counters that the district court properly denied the Trust's motion for a judgment as a matter of law because its trustee, Carmine Vento, was also an operator of the restaurant and involved in deciding how the operation was set up, and mode of operation was one basis for liability. Giglio further argues that the Trust acted as more than a mere landlord. Giglio points out that Vento testified that the Trust held the gaming license for Carmine's Little Italy to permit the Trust to continue operating the business if something happened to him and that all of the income from the restaurant went to the Trust.

FGA replies that the mode of operation theory cannot support liability for the Trust and the only support in the record for Giglio's argument that the Trust is more than a landlord is the trial testimony that the Trust's name was also listed on Carmine's gaming license.

[Headnotes 27, 28]

This court reviews a district court's denial of a motion for judgment as a matter of law de novo. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424-25 (2007). A motion for judgment as a

---

[7]Giglio's counsel argued:

> Remember I asked, [Frank Vento], well are you as certain of that as you are of your testimony . . . a few days ago when you said he asked you three times does your company have a non-restricted gaming license or a restricted gaming license?
>
> A. That is a non-restricted proper gaming license.
>
> Q. Non-restricted property?
>
> Yeah, non-restricted license.
>
> Q. This is a non-restricted license?
>
> Yes.
>
> Not once, not twice, three times he testifies that way.
>
> And then Carmine, just like with everything else, comes in and testifies inconsistently. Oh, no it's a restricted license.
>
> How do we know what it is? We don't know what it is. Nobody produced the license.

matter of law may be granted if the opposing party ''failed to prove a sufficient issue for the jury,' so that [the] claim cannot be maintained under the controlling law.'' *Id.* at 222, 163 P.3d at 424 (quoting NRCP 50(a)(1)). The court must view all evidence and inferences in favor of the nonmoving party. *Id.*

[Headnote 29]

A landlord is not liable for injury caused by the negligent actions of its tenant. *Wright v. Schum*, 105 Nev. 611, 612-13, 781 P.2d 1142, 1142-43 (1989). However, a landlord is still subject to the duty of all persons to ''exercise reasonable care not to subject others to an unreasonable risk of harm.'' *Id.* at 614, 781 P.2d at 1143 (quotations omitted).

In *Wright*, the plaintiff was mauled by a pit bull and sued the landlord and owner of the premises from which the dog had escaped. *Id.* at 612, 781 P.2d at 1142. The landlord had previously received complaints from neighbors about the dog's aggressiveness and had assured them that he would take care of the problem by asking his tenants to get rid of the dog or move out of the house. *Id.* at 614-15, 781 P.2d at 1143-44. However, he allowed the tenants to stay and keep the dog because they promised to keep the dog in the house or chained in the yard. *Id.* at 615, 781 P.2d at 1144. This court held that while the landlord was not liable because of his status as a landlord, there was a material issue of fact as to whether he was liable as an individual because he voluntarily undertook to discharge part of the dog owner's duty to the general public to prevent the dog from leaving the leased premises and harming others. *Id.* at 613-18, 781 P.2d at 1143-46. Here, like the landlord in *Wright*, the Trust is potentially liable not based on its status as a landlord, but rather based on its own actions.

In denying FGA's motion for a judgment as a matter of law, the district court stated that it was the jury's ''decision to make a determination as to whether or not the way [the restaurant] was set up from the mode of operation standpoint resulted in a potentially hazardous condition that the property owner and the business owner or the FGA is responsible for.'' Because we now hold that the mode of operation approach does not apply in the sit-down restaurant context, any jury will not be instructed on this approach. Thus, the basis for the district court's ruling is no longer present in this case. Therefore, the district court must determine whether Giglio presented sufficient evidence for the jury to find the Trust liable based on its own conduct.[8]

---

[8]We note that although the Trust is potentially liable based on its own actions, it may still benefit from the argument raised by FGA that it was not allowed to provide evidence of the lack of prior slip and falls. This evidence is relevant to the issue of whether the Trust voluntarily undertook to discharge part of FGA's duty to maintain safe premises.

[Headnote 30]

Accordingly, we vacate the district court's order denying judgment as a matter of law and reverse the district court's judgment. We remand this matter to the district court for a new decision on the motion for judgment as a matter of law and for further proceedings in light of this opinion.[9]

HARDESTY and PARRAGUIRRE, JJ., concur.

RYAN'S EXPRESS TRANSPORTATION SERVICES, INC., A NEVADA CORPORATION, APPELLANT, *v.* AMADOR STAGE LINES, INC., A FOREIGN CORPORATION, RESPONDENT.

No. 56570

June 14, 2012 279 P.3d 166

Motion to disqualify law firm. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appeal was taken from the dismissal order of the district court and appeal was assigned to the supreme court's settlement program. Following settlement conference, parties were unable to reach an agreement, and one of the parties moved to disqualify its opponent's counsel because an alleged imputed conflict of interest was created when a law firm, of which the settlement judge was a shareholder, invited opponent's counsel to become a shareholder as well and took over representation of the party in the appeal. The supreme court, DOUGLAS, J., held that: (1) the district court was required to conduct evidentiary hearing to determine whether measures taken to screen the settlement judge were sufficient to eliminate any conflict of interest that might otherwise have been imputed to the judge's entire firm, and (2) the supreme court had the power to remand the case for further evidentiary proceedings under its inherent authority as a constitutional court.

Ruling on motion deferred pending limited remand.

---

[9]FGA argues that on remand, the matter should be assigned to a different judge because it appears that the district court judge prejudged the issues in the case. However, in light of FGA's failure to cite to any specific instances of judicial misconduct, we conclude that reassignment is not warranted. *See In re AMERCO Derivative Litigation*, 127 Nev. 196, 229 n.13, 252 P.3d 681, 704 n.13 (2011) (denying a similar unsubstantiated request that a matter be assigned to a different judge upon remand because the district court ''prejudged'' the case).

Additionally, because we conclude that there was reversible error, we need not address FGA's cumulative-error argument.

Gibbs, Giden, Locher, Turner & Senet, LLP, and *Becky A. Pintar* and *Airene Haze*, Las Vegas, for Appellant.

Woodburn and Wedge and *Ellen Jean Winograd*, Reno, for Respondent.

1. ATTORNEY AND CLIENT.
   It is within the inherent power of the supreme court to govern the conduct of the members of the bar appearing before it.
2. JUDGES.
   Similar to an attorney-client relationship, parties coming before a supreme court settlement judge must have the utmost confidence that confidential information disclosed to the settlement judge will remain confidential; these duties of confidentiality and avoidance of conflicts of interest persist even after the termination of the settlement proceedings. RPC 1.6.
3. JUDGES.
   Supreme court settlement judges, like attorneys and judges, also have an obligation to avoid even the appearance of impropriety. RPC 1.6; NCJC Canon 1.
4. ATTORNEY AND CLIENT.
   The supreme court settlement judge who oversaw failed settlement agreement between litigants was later disqualified from representing one of the litigants on appeal, where following the failed agreement, a law firm of which he was a shareholder also took on the attorney of one of the litigants as a shareholder, and the law firm initiated representation of that litigant through that attorney, and informed consent was not obtained to allow the judge to participate in the case. RPC 1.12.
5. ATTORNEY AND CLIENT.
   When determining whether to disqualify a client's counsel or law firm due to a conflict of interest, the importance of competing concerns of preserving confidentiality and allowing litigants to chose their counsel requires the supreme court to carefully balance one client's right to choice of counsel against another client's interest in avoiding disclosure of confidential information. RPC 1.10-1.12.
6. ATTORNEY AND CLIENT.
   When a lawyer is disqualified from participating in litigation, the screening of that lawyer by his law firm, under the applicable rules of professional conduct, may be used to rebut the presumption of shared confidences. RPC 1.10-1.12.
7. ATTORNEY AND CLIENT.
   To determine whether screening for nonlawyers has been or may be effective, the district court should consider the following nonexclusive factors: (1) the substantiality of the relationship between the former and current matters; (2) the time elapsed between the matters; (3) the size of the firm; (4) the number of individuals presumed to have confidential information; (5) the nature of their involvement in the former matter; (6) the timing and features of any measures taken to reduce the danger of disclosure; and (7) whether the old firm and the new firm represent adverse parties in the same proceeding, rather than in different proceedings because inadvertent disclosure by the nonlawyer employee is more likely in the former situation. RPC 1.10-1.12.
8. ATTORNEY AND CLIENT.
   The timing of the implementation of measures used to screen a disqualified attorney from his or her law firm to prevent the sharing of con-

fidential information of that firm's party opponent, in relation to the occurrence of the event that disqualified the attorney, is relevant in determining whether the screen was properly erected; the screen must be in place when the attorney joins the firm. RPC 1.10-1.12.

9. ATTORNEY AND CLIENT.
When presented with a dispute over whether a disqualified lawyer has been properly screened, Nevada courts should conduct an evidentiary hearing to determine the adequacy and timeliness of the screening measures on a case-by-case basis; the burden of proof is upon the party seeking to cure an imputed disqualification with screening to demonstrate that the use of screening is appropriate for the situation and that the disqualified attorney is timely and properly screened. RPC 1.10-1.12.

10. APPEAL AND ERROR.
In determining whether settlement judge, who was also a shareholder at a law firm, had been properly screened by that firm to prevent a conflict of interest from being imputed to the entire firm after judge learned confidential information in a settlement proceeding regarding the party opponent of one of law firm's clients, district court was required to conduct evidentiary hearing on remand to determine whether measures taken to screen the settlement judge were sufficient to eliminate any conflict of interest that might otherwise have been imputed to the judge's entire firm. RPC 1.10-1.12.

11. ATTORNEY AND CLIENT.
When considering whether the implemented measures screening a disqualified attorney from the rest of his firm are adequate, the district courts are to be guided by the following nonexhaustive list of factors: (1) instructions given to ban the exchange of information between the disqualified attorney and other members of the firm; (2) restricted access to files and other information about the case; (3) the size of the law firm and its structural divisions; (4) the likelihood of contact between the quarantined lawyer and other members of the firm; and (5) the timing of the screening. RPC 1.10-1.12.

12. ATTORNEY AND CLIENT.
As with motions to disqualify, the consideration of the adequacy of measures to screen attorneys by their law firms when there is a potential for an imputed conflict of interest is within the sound discretion of the district court; however, the district court must justify its determination as to the adequacy of the screening in a written order with specific findings of fact and conclusions of law. RPC 1.10-1.12.

13. COURTS.
The supreme court had inherent authority, as a constitutional court, to remand case for an evidentiary hearing to determine sufficiency of law firm's screening of shareholder of firm who would otherwise impute a conflict of interest to the whole firm due to information he learned as a settlement judge. Const. art. 6, § 4.

14. APPEAL AND ERROR.
An appellate court is not particularly well-suited to make factual determinations in the first instance.

15. APPEAL AND ERROR.
The power to order a limited remand to resolve factual issues comes from the inherent power of the courts. Const. art. 6, § 4.

16. COURTS.
The supreme court's authority encompasses powers reasonable and necessary for the administration of court procedure and management of judicial affairs. Const. art. 6, § 4.

17. COURTS.
While the supreme court's inherent authority is not infinite, it should be exercised when established methods fail. Const. art. 6, § 4.

18. COURTS.
By virtue of constitutional existence, the supreme court is vested with inherent authority to accomplish or carry out basic functions of the judiciary. Const. art. 6, § 4.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

Although the Nevada Rules of Professional Conduct (RPC) permit the screening of disqualified attorneys to prevent an associated law firm's imputed disqualification in some cases, RPC 1.10(e); 1.11(b); 1.12(c), we have never considered whether screening is appropriate with regard to a settlement judge acting under this court's settlement conference program or how to determine the sufficiency of any screening measures utilized. We take this opportunity to consider the practice of attorney screening to cure imputed disqualification.

The parties agree that supreme court settlement judge Nicholas Frey is disqualified from representing respondent Amador Stage Lines, Inc., in the present matter. Pursuant to RPC 1.12(c), Frey's disqualification is imputed to the remaining members of his law firm, Woodburn and Wedge, but the parties disagree on whether screening may be utilized to cure the imputed disqualification. In order to resolve appellant Ryan's Express Transportation Services, Inc.'s pending motion to disqualify Woodburn and Wedge from representing Amador in this appeal, we must consider whether screening may be used to cure imputed disqualification in this situation and whether the screening measures taken by Woodburn and Wedge are sufficient.

However, because we conclude that more facts are necessary for us to consider the sufficiency of Woodburn and Wedge's screening measures, we defer ruling on the motion to disqualify and remand this matter to the district court for the limited purpose of conducting an evidentiary hearing and entering written findings of fact and conclusions of law regarding the adequacy of the screening.

FACTS AND PROCEDURAL HISTORY

Ryan's Express appeals from a district court's order dismissing its claims against Amador, and the appeal was assigned to this court's settlement program. *See* NRAP 16. Frey, a shareholder at the law firm of Woodburn and Wedge, was appointed as the set-

tlement judge. After receiving the parties' confidential settlement statements, Frey held a settlement conference, but the parties were unable to reach an agreement. Thereafter, Amador's counsel of many years, Ellen Jean Winograd, accepted a position as a shareholder at Woodburn and Wedge, and Woodburn and Wedge substituted as counsel for Amador in the instant appeal.

Ryan's Express now moves to disqualify Woodburn and Wedge as Amador's counsel, asserting that a conflict of interest exists based on Frey's involvement in the case as a settlement judge, that the conflict is necessarily imputed to the entire law firm, and that the conflict cannot be cured by any screening measures. Amador admits that Frey is disqualified, but argues that the screening measures Woodburn and Wedge have undertaken are sufficient to cure the conflict, and that Winograd should be allowed to continue representing Amador.

DISCUSSION

Ryan's Express argues that Woodburn and Wedge must be disqualified from representing Amador in this appeal because Frey participated as a supreme court settlement judge in this matter. Ryan's Express contends that because Frey obtained highly confidential information pertaining to its strategies and factual and legal contentions, Frey must be disqualified and Frey's disqualification must be imputed to all other members of Woodburn and Wedge. Ryan's Express asserts that Frey's conflict of interest is fatal to Woodburn and Wedge's representation of Amador and cannot be cured by screening because RPC 1.10(e)(1) permits screening only where a disqualified lawyer did not have a ''substantial role in or primary responsibility for the matter that causes the disqualification.'' Ryan's Express insists that a law firm that employs a settlement judge who received confidential ex parte information must be disqualified in order to preserve the public trust, and that no screening measures can cure this disqualification. Furthermore, Ryan's Express argues that the interest of preventing public suspicion of the settlement program outweighs the interest of Amador's right to counsel of choice.

Amador, however, argues that disqualification of the entire firm is unnecessary and unwarranted. Amador contends that (1) Frey is an attorney and a supreme court settlement judge of the highest caliber and integrity, and that he would never compromise the settlement program; (2) disqualification of the firm would impose substantial hardship in Amador's opposition to the pending appeal because it would lose the services of its original counsel; (3) the applicable rule of professional conduct is RPC 1.12, which expressly permits the screening of mediators, arbitrators, and former judges to prevent imputed disqualification; and (4) Woodburn and

Wedge has gone to extensive lengths to screen Frey from the present appeal.

Background

[Headnotes 1-3]

This court and other courts have long recognized that it is within the inherent power of the court to govern the conduct of the members of the bar appearing before it. *State Bar of Nevada v. Claiborne*, 104 Nev. 115, 126, 756 P.2d 464, 471 (1988); *see, e.g.*, *State ex rel. NSBA v. Krepela*, 610 N.W.2d 1, 3 (Neb. 2000); *Beyers v. Richmond*, 937 A.2d 1082, 1091 (Pa. 2007); *Swafford v. Harris*, 967 S.W.2d 319, 321 (Tenn. 1998). Similar to the principles governing attorney-client relationships and judicial conduct, settlement judges in this court's settlement program are under a duty of confidentiality and a duty to avoid conflicts of interest. *In the Matter of the Adoption of Rule 16 of the Nevada Rules of Appellate Procedure Governing Settlement Conferences in Civil Appeals*, ADKT 244 (Order Adopting Code of Conduct for Supreme Court Settlement Judges, March 10, 2006) [hereinafter, Code of Conduct for Supreme Court Settlement Judges]. Similar to an attorney-client relationship, parties coming before a settlement judge must have the ''utmost confidence'' that confidential information disclosed to the settlement judge will remain confidential. *Compare* RPC 1.6 *with* Code of Conduct for Supreme Court Settlement Judges, *supra*, Standard V (employing language similar to Nevada Rules of Professional Conduct and requiring settlement judges to maintain the confidentiality of all information learned from mediation and private sessions). These duties of confidentiality and avoidance of conflicts of interest persist even after the termination of the settlement proceedings. Code of Conduct for Supreme Court Settlement Judges, *supra*, Standard III(G). Settlement judges, like attorneys and judges, also have an obligation to avoid even the appearance of impropriety. *Id.* Standard III(A), (G); Revised Nevada Code of Judicial Conduct Canon 1; *Collier v. Legakes*, 98 Nev. 307, 310, 646 P.2d 1219, 1220-21 (1982).

[Headnote 4]

In this case, the parties agree that Frey is disqualified.[1] As the settlement judge for this appeal, Frey ''participated personally and substantially'' as a third-party neutral, and unless all parties give informed consent in writing, RPC 1.12(a), he may not represent

---

[1]We note that although Ryan's Express argues that RPC 1.10 is applicable, this is incorrect. Instead, this motion is governed by RPC 1.12. While RPC 1.10 governs the imputation of disqualifications generally, RPC 1.12 specifically governs conflicts of interest relating to former judges, arbitrators, mediators, and other third-party neutrals. Therefore, we proceed to analyze this motion under RPC 1.12.

anyone in connection with this matter. No such consent was given here. Furthermore, Woodburn and Wedge is necessarily disqualified under RPC 1.12's imputation provision, unless it can demonstrate that Frey was timely and adequately screened pursuant to RPC 1.12(c). Therefore, we turn our attention to the issue of screening.

Screening may be used to cure imputed disqualification

[Headnote 5]

The ethical principles and public policy considerations that lead us to impose a presumption of shared confidence[2] and at times disqualify entire law firms, however, do not come without a heavy cost. In applying the rule of imputed disqualification, we restrict the client's right to choice of counsel.[3] *Leibowitz v. Dist. Ct.*, 119 Nev. 523, 532, 78 P.3d 515, 521 (2003). The importance of these competing concerns requires us to carefully balance one client's right to choice of counsel against another client's interest in avoiding disclosure of confidential information.

Here, because the settlement program is court-sponsored, any perceived improprieties will have a potential impact on the public's confidence in the judicial process. A perception that a party opponent could learn confidential information from the presiding settlement judge will also undermine the ability of the settlement program to resolve matters in a quick, cost-effective, and satisfactory manner. Parties will be less willing to share confidences when there is a fear that the settlement judge may later take this knowledge to an adversary.

---

[2]A presumption of shared confidence, wherein it is presumed that an attorney takes with him or her any confidences gained in a former relationship and shares them with the firm, is imposed by the imputation provisions of RPC 1.10, 1.11, and 1.12.

[3]The Seventh Circuit Court of Appeals has explained that

> disqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their own choosing. . . . We do not mean to infer that motions to disqualify counsel may not be legitimate, for there obviously are situations where they are both legitimate and necessary; nonetheless, such motions should be viewed with extreme caution for they can be misused as techniques of harassment.

Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721-22 (7th Cir. 1982) (citations omitted); *see also Leibowitz v. Dist. Ct.*, 119 Nev. 523, 532, 78 P.3d 515, 521 (2003) (''Imputed disqualification is considered a harsh remedy that 'should be invoked if, and only if, the [c]ourt is satisfied that real harm is likely to result from failing to invoke it.' '' (alteration in original) (quoting *Hayes v. Central States Orthopedic*, 51 P.3d 562, 565 (Okla. 2002))).

On the other hand, an uncompromising rule that strictly requires the disqualification of a law firm associated with a settlement judge is problematic. Such a rule may have an effect of deterring otherwise well-qualified attorneys from seeking appointment as settlement judges. It may also impede the movement of attorneys associated with a settlement judge. Such a rule would potentially restrict a client's choice of counsel needlessly. Lawyers, simply, are not fungible goods. *See Ryan v. Dist. Ct.*, 123 Nev. 419, 427, 168 P.3d 703, 709 (2007); *Bongiovi v. Sullivan*, 122 Nev. 556, 571, 138 P.3d 433, 444 (2006); *see also Robins v. United States*, 404 U.S. 1049, 1052 (1972) (Brennan, J., dissenting); *Carlson v. Jess*, 507 F. Supp. 2d 968, 980 (E.D. Wis. 2007). One lawyer cannot substitute for another lawyer's skills, experience, and other unquantifiable characteristics.

[Headnote 6]

Because of the conflicting public policy and ethical concerns, we hold that the screening of lawyers, under the applicable rules of professional conduct, may be used to rebut the presumption of shared confidences.

Adequacy of screening measures

Under RPC 1.12(c), the law firm the disqualified lawyer is associated with will not be disqualified if

> (1) The disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) Written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

[Headnote 7]

This court has tasked the district court with considering the sufficiency of screening measures instituted in regard to a nonlawyer employee in order to avoid imputed disqualification. *Leibowitz*, 119 Nev. at 533, 78 P.3d at 522. To assist the district court in making this determination, this court went so far as to set forth a list of factors to consider.[4] *Id.* at 534, 78 P.3d at 522. Although we have yet to consider the adequacy of screening measures utilized where

---

[4]We have recognized seven nonexclusive factors when considering the adequacy and timing of screening measures for nonlawyers:

> To determine whether screening has been or may be effective, the district court should consider: (1) ''the substantiality of the relationship between the former and current matters,'' (2) ''the time elapsed between the matters,'' (3) ''the size of the firm,'' (4) ''the number of individuals presumed to have confidential information,'' (5) ''the nature of their involvement in the former matter,'' (6) ''the timing and features of any measures taken to reduce the danger of disclosure,'' and (7) whether the

a lawyer is disqualified pursuant to RPC 1.12, several jurisdictions have considered the adequacy of screening measures utilized in this and similar situations, and each utilizes similar nonexclusive factors in making such a determination on a case-by-case basis. Kevin W. Brown, Annotation, *Sufficiency of Screening Measures (Chinese Wall) Designed to Prevent Disqualification of Law Firm, Member of Which is Disqualified for Conflict of Interest*, 68 A.L.R. Fed. 687 (1984); *see Pappas v. Waggoner's Heating & Air, Inc.*, 108 P.3d 9, 14 (Okla. Civ. App. 2004) (considering the sufficiency of screening mechanisms under the framework of Oklahoma's counterpart to RPC 1.12); *see also Cromley v. Bd. of Educ. of Lockport H. S. D. 205*, 17 F.3d 1059, 1065 (7th Cir. 1994); *Stencel v. Fairchild Corp.*, 174 F. Supp. 2d 1080, 1086 (C.D. Cal. 2001); *Chapman v. Chrysler Corp.*, 54 F. Supp. 2d 864, 866 (S.D. Ind. 1999). Those factors include:

> (1) instructions given to ban the exchange of information between the disqualified attorney and other members of the firm; (2) restricted access to files and other information about the case; (3) prohibited sharing in fees derived from the litigation; (4) the size of the law firm and its structural divisions; and (5) the likelihood of contact between the quarantined lawyer and other members of the firm.

Pappas, 108 P.3d at 14. The Court of Appeals for the Seventh Circuit explained that the presumption of shared confidences ''could be rebutted by demonstrating that 'specific institutional mechanisms' . . . had been implemented to effectively insulate against any flow of confidential information from the 'infected' attorney to any other member of his present firm.'' *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983) (quoting *LaSalle Nat. Bank v. Lake County*, 703 F.2d 252, 259 (7th Cir. 1983)); *see also Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222, 225 (6th Cir. 1988) (adopting the Seventh Circuit's approach in addressing motions to vicariously disqualify a law firm); *Smith v. Whatcott*, 757 F.2d 1098, 1101-02 (10th Cir. 1985), *superseded by rule on other grounds*, Utah Rules of Professional Conduct 1.10, *as recognized in SLC Ltd. V v. Bradford Group West, Inc.*, 999 F.2d 464, 468 (10th Cir. 1993). However, the Seventh Circuit has also held that the absence of institutional mechanisms[5] to pre-

---

> ''old firm and the new firm represent adverse parties in the same proceeding, rather than in different proceedings'' because inadvertent disclosure by the nonlawyer employee is more likely in the former situation.

Leibowitz, 119 Nev. at 534, 78 P.3d at 522 (quoting *In re Bell Helicopter Textron, Inc.*, 87 S.W.3d 139, 146 (Tex. App. 2002)).

[5]Such institutional mechanisms have been referred to as ''Chinese walls'':

> Chinese Walls are specific institutional mechanisms which prevent contact between the tainted attorney and members of the firm working on the

vent the sharing of information, including inadvertent sharing, would justify disqualification of the new law firm under the imputation rule, even though the disqualified attorney had attested in his affidavit that he did not disclose ''any information'' about the former client's strategy or legal theories. *LaSalle*, 703 F.2d at 259.

[Headnote 8]

Additionally, the timing of the implementation of screening measures in relation to the occurrence of the disqualifying event is relevant in determining whether the screen was properly erected. *Cf. Leibowitz*, 119 Nev. at 534 (considering the effectiveness of screening measures for nonattorney employees). Furthermore, the screen must be in place when the attorney joins the firm. *Kala v. Aluminum Smelting & Refining Co.*, 688 N.E.2d 258, 267 (Ohio 1998).

[Headnotes 9, 10]

Today, we adopt an analysis similar to the approaches taken by the courts discussed above. When presented with a dispute over whether a lawyer has been properly screened, Nevada courts should conduct an evidentiary hearing to determine the adequacy and timeliness of the screening measures on a case-by-case basis. The burden of proof is upon the party seeking to cure an imputed disqualification with screening to demonstrate that the use of screening is appropriate for the situation and that the disqualified attorney is timely and properly screened.

[Headnote 11]

When considering whether the screening measures implemented are adequate, courts are to be guided by the following nonexhaustive list of factors:

> (1) instructions given to ban the exchange of information between the disqualified attorney and other members of the firm;
>
> (2) restricted access to files and other information about the case;
>
> (3) the size of the law firm and its structural divisions;

---

related matter. Such mechanisms may be structural, such as departmentalization, procedural, as in restricting access to files, pecuniary, by denying the tainted attorney any remuneration from fees derived from the representation, or educational, such as providing programs that make firm members aware of the ban on exchange of information. Usually, effective screening procedures involve all of the above components.

Marc I. Steinberg & Timothy U. Sharpe, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 Notre Dame L. Rev. 1, 20 (1990) (quotations and footnotes omitted).

(4) the likelihood of contact between the quarantined lawyer and other members of the firm; and

(5) the timing of the screening.

[Headnote 12]

As with motions to disqualify, the consideration of the adequacy of screening is within the sound discretion of the district court, *LaSalle*, 703 F.2d at 256; however, the district court must justify its determination as to the adequacy of the screening in a written order with specific findings of fact and conclusions of law.

In this case, although Amador's counsel supplied two affidavits to support Woodburn and Wedge's use of a screening device to prevent imputed disqualification, we conclude that an evidentiary hearing is necessary to determine the sufficiency of the screening measures implemented by Woodburn and Wedge.

This matter is remanded to the district court for an evidentiary hearing on the screening issue

[Headnote 13]

In Nevada, there is no specific statute or rule that specifically authorizes this court to remand a matter to a district court for additional fact-finding when an issue of fact arises in the first instance before this court. Although we have remanded cases to the district court for additional fact-finding in the past, we have never indicated from where the authority for such procedure is derived. *Zugel v. Miller*, 99 Nev. 100, 659 P.2d 296 (1983); *Pease v. Taylor*, 86 Nev. 195, 467 P.2d 109 (1970); *see also Zobrist v. Sheriff*, 96 Nev. 625, 614 P.2d 538 (1980). We take this opportunity to do so.

[Headnote 14]

An appellate court is not particularly well-suited to make factual determinations in the first instance. *Zugel*, 99 Nev. at 101, 659 P.2d at 297; 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3937.1 (2d ed. 1996) (''Appellate procedure is not geared to factfinding.''); *see also Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (explaining that a trial court is better suited as an original finder of fact because of the trial judge's superior position to make determinations of credibility and experience in making determinations of fact); *Alburquerque v. Bara*, 628 F.2d 767, 775 (2d Cir. 1980) (remanding habeas petition to district court for additional fact findings because Court of Appeals was not well-suited to make factual findings). An appellate court's ability to make factual determinations is hampered by the rules of appellate procedure, the limited

ability to take oral testimony, and its panel or en banc nature. However, an appellate court must have the ability to resolve factual disputes that arise post-appeal.

Other jurisdictions have resolved the difficulty of fact-finding by courts of review by adopting specific rules of appellate procedure. For example, California courts adopted a court rule, appellate rule 8.252, which permits a party to move to have a reviewing court take evidence. An order granting such a motion must:

> (A) State the issues on which evidence will be taken;
>
> (B) Specify whether the court, a justice, or a special master or referee will take the evidence; and
>
> (C) Give notice of the time and place for taking the evidence.

Id. Similarly, federal courts have adopted Rule 48 of the Federal Rules of Appellate Procedure. FRAP 48 authorizes a court of appeals to appoint a special master ''to hold hearings, if necessary, and to recommend factual findings and dispositions in matters ancillary to proceedings in the court.'' First adopted in 1994, FRAP 48 specifically authorizes the use of masters in instances where a court of appeals is required to make a factual determination. FRAP 48 advisory committee note. The advisory committee explained that although the general and ordinary practice is to remand a case to the district court or agency that originally heard the case when factual issues remain unresolved, the ability to refer a factual issue to a master for a recommendation is useful when a factual issue arises in the first instance before the court of appeals. *Id*. And even before the adoption of FRAP 48, federal courts of appeal long engaged in the practice of using masters to address questions requiring a factual determination. *Id*. (citing *Polish National Alliance v. NLRB*, 159 F.2d 38 (7th Cir. 1946); *NLRB v. Arcade-Sunshine Co.*, 132 F.2d 8 (D.C. Cir. 1942); *NLRB v. Remington Rand, Inc.*, 130 F.2d 919 (2d Cir. 1942)).

[Headnotes 15-18]

Although California courts and federal appellate courts have resolved the difficulty of fact-finding by courts of review by adoption of court rules and appellate procedures, we conclude that the power to order a limited remand to resolve factual issues comes from the inherent power of the courts. By virtue of constitutional existence, this court is vested with inherent authority to accomplish or carry out basic functions of the judiciary. *Halverson v. Hardcastle*, 123 Nev. 245, 261-62, 163 P.3d 428, 440 (2007); *see also Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988). The court's authority encompasses powers '' '*reasonable and necessary*' '' for the administration of court procedure and management of judicial affairs. *Halverson*, 123 Nev. at 261, 163 P.3d at 440 (quoting *Borger v. Dist. Ct.*, 120 Nev. 1021, 1029, 102 P.3d

600, 606 (2004)). While our inherent authority is not infinite, it should be exercised when established methods fail. *Id.* at 263, 163 P.3d at 441.

Accordingly, we exercise our inherent authority and remand this matter to the district court for an evidentiary hearing to determine the sufficiency of the screening measures adopted by Woodburn and Wedge based on the analysis set forth above. We defer ruling on the motion to disqualify Amador's counsel pending our consideration of the district court's findings of fact and conclusions of law. The district court shall enter such an order within 45 days from the date of this opinion, and the district court clerk shall immediately thereafter transmit a copy of the order to this court. The briefing schedule in this appeal shall remain suspended pending further order of this court.

CHERRY, C.J., and SAITTA, GIBBONS, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

CHERYL DAVIS, AN INDIVIDUAL; AND TRIPLE WIN, LLC, DBA PLATINUM PROPERTIES GMAC REAL ESTATE, A NEVADA LIMITED LIABILITY COMPANY, APPELLANTS/CROSS-RESPONDENTS, *v.* KRISTEN L. BELING, AN INDIVIDUAL; AND WILLIAM DOUGHERTY, JR., AN INDIVIDUAL AND AS TRUSTEE OF THE DOUGHERTY-BELING FAMILY TRUST, RESPONDENTS/CROSS-APPELLANTS.

No. 53182

June 14, 2012 278 P.3d 501

Appeal and cross-appeal from a district court judgment in a real property contract action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.[1]

Real estate agent brought claims against vendors for breach of contract, unjust enrichment, and fraud; vendors brought counterclaims against agent for fraud and for violation of agent's statutory duties and against broker who employed agent for respondeat superior liability; and broker brought claims for breach of contract against vendors. Following jury trial, the district court entered judgment for vendors. Agent and broker appealed, and vendors cross-appealed. The supreme court, SAITTA, J., held that: (1) as a

[1]Senior Judge Joseph T. Bonaventure presided over the trial of this case. District Court Judge Michael P. Villani decided the parties' pretrial motions. District Court Judge Douglas W. Herndon decided the parties' post-trial motions and entered the final judgment.

matter of first impression, statute providing that offers of compromise are admissible only when offered for purpose other than proving liability or amount of claim does not allow compromise offers to be introduced to demonstrate a failure to mitigate damages; (2) vendors' fraud-by-concealment claim against agent was precluded by statute providing that real estate licensees are not required to comply with principles of common law; (3) evidence was sufficient to support vendors' claim against agent for violation of agent's statutory duties; (4) vendors' claim against broker for respondeat superior was not precluded by statute providing that real estate licensees are not required to comply with principles of common law; (5) as a matter of first impression, term ''actual damages'' as used in statute permitting person who has suffered damages as proximate result of real estate licensee's failure to perform statutory duties is synonymous with ''compensatory damages''; (6) vendors could recover damages for diminution in value of home purchased as a result of agent's alleged failure to disclose material information in claim against agent for violation of statutory duties; (7) vendors could recover carrying costs of home purchased as a result of agent's alleged failure to disclose material information as consequential damages in claim against agent for violation of statutory duties; and (8) economic loss doctrine did not bar vendors' recovery of damages from agent.

Affirmed in part, reversed in part, and remanded.

David J. Winterton & Associates, Ltd., and *David J. Winterton* and *David E. Doxey*, Las Vegas, for Appellants/Cross-Respondents.

Dziminski & Associates and *Brian R. Dziminski*, Las Vegas, for Respondents/Cross-Appellants.

1. Appeal and Error.
   The district court's determination of the admissibility and relevance of evidence is generally reviewed for an abuse of discretion.
2. Appeal and Error.
   To the extent that an evidentiary ruling rests on a legal interpretation of the evidence code, de novo review obtains.
3. Statutes.
   When construing a statute, the supreme court first examines its plain meaning.
4. Statutes.
   In examining the plain meaning of a statute during statutory construction, the supreme court reads its provisions as a whole, and gives effect to each of its words and phrases.
5. Statutes.
   When a statute is clear and unambiguous, the supreme court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction.

6. EVIDENCE.
   For purposes of statute providing that evidence of offers of compromise are admissible only when offered for a purpose other than proving liability or amount of claim, an ''offer of compromise'' is an offer by one party to settle a claim where an actual dispute or a difference of opinion exists at the time the offer is made. NRS 48.105.
7. EVIDENCE.
   Statute providing that offers of compromise are admissible only when offered for purpose other than proving liability or amount of claim does not allow compromise offers to be introduced to demonstrate a failure to mitigate damages; such evidence inescapably goes to the amount of the claim and thus is inadmissible. NRS 48.105.
8. EVIDENCE.
   Purpose of statute providing that offers of compromise are admissible only when offered for purpose other than proving liability or amount of claim is to prevent evidence of settlement efforts from haunting a future legal proceeding. NRS 48.105.
9. APPEAL AND ERROR.
   Questions of statutory construction, including the meaning and scope of a statute, are questions of law, which the supreme court reviews de novo.
10. APPEAL AND ERROR.
    Fact-finder's fact-based conclusions of law are entitled to deference on appellate review and will not be disturbed if supported by substantial evidence.
11. BROKERS.
    Statute providing that real estate licensees are not required to comply with principles of common law precludes common law claims against real estate licensees to the extent that the type of conduct forming the basis of such a claim is the type of conduct proscribed in statutes governing duties of such licensees. NRS 645.251-645.254.
12. BROKERS.
    Vendors' fraud-by-concealment claim against their real estate agent based on agent's alleged failure to disclose material information regarding vendors' attempt to sell home and purchase another home were precluded by statute providing that real estate licensees are not required to comply with principles of common law, as agent's alleged conduct overlapped with agent's duties of disclosure described in statutes governing conduct of real estate licensees. NRS 645.251, 645.252(1), 645.254(5).
13. BROKERS.
    Evidence that vendors' real estate agent failed to disclose material information regarding vendors' attempt to sell home and purchase another home was sufficient to support claim against real estate agent under statute permitting action against real estate licensees to recover damages suffered as a result of licensee's failure to perform duties required by statutes governing conduct of such licensees. NRS 645.252(1), 645.254(5), 645.257.
14. BROKERS.
    Vendors' claim against real estate broker who employed vendors' real estate agent for respondeat superior liability based on agent's alleged failure to disclose material information regarding vendors' attempt to sell home and purchase another home was not precluded by statute providing that real estate licensees are not required to comply with principles of common law that may apply to duties of such licensees described by

statutes governing such licensees; respondeat superior liability is not covered in those statutes and those statutes have nothing to do with such liability. NRS 645.251, 645.257.

15. APPEAL AND ERROR.
Whether a party is entitled to a particular measure of damages is a question of law reviewed de novo.

16. BROKERS.
Term ''actual damages,'' as used in statute permitting person who has suffered damages as proximate result of real estate licensee's failure to perform any duties required by statutes governing such licensees to bring action against licensee for recovery of person's actual damages, is synonymous with ''compensatory damages.'' NRS 645.257.

17. BROKERS.
Vendors could recover damages for diminution in value of home that vendors purchased as a result of real estate agent's alleged failure to disclose material information regarding vendors' attempt to sell home and purchase another home in vendors' suit against agent pursuant to statute permitting person who has suffered damages as proximate result of real estate licensee's failure to perform duties required by statutes governing such licensees to bring action against licensee; although damages in misrepresentation cases generally were calculated as of date when fraud took effect, agent's alleged fraudulent concealment had nothing to do with value of purchased home, and diminution damages constituted most significant portion of loss vendors suffered as result of alleged fraud. NRS 645.257.

18. BROKERS.
Vendors could recover carrying costs of home that vendors purchased as a result of real estate agent's alleged failure to disclose material information regarding vendors' attempt to sell home and purchase another home, such as property insurance, taxes, and maintenance, as consequential damages in vendors' suit against agent pursuant to statute permitting person who has suffered damages as proximate result of real estate licensee's failure to perform duties required by statutes governing such licensees to bring action against licensee; carrying costs were reasonably incurred to minimize effects of agent's alleged deception and were necessary in order for vendors to mitigate their damages.

19. DAMAGES.
Consequential damages may not be awarded when they are duplicative of the general damages awarded; that is, when they have been accounted for already by the general damages recovery.

20. TORTS.
Economic loss doctrine does not bar the recovery of purely economic losses when the defendant intentionally breaches a duty that is imposed independently of the obligations arising from contract.

21. BROKERS.
Economic loss doctrine did not bar vendors' recovery of damages from real estate agent in vendors' suit against agent pursuant to statute permitting person who has suffered damages as proximate result of real estate licensee's failure to perform duties required by statutes governing such licensees to bring action against licensee based on vendors' purchase of home as a result of agent's alleged failure to disclose material information regarding vendors' attempt to sell home and purchase another home; vendors' claims were not based upon breach of obligation arising

from contract but were predicated upon agent's intentional breach of separate statutory duties.

22. APPEAL AND ERROR.
Although district court's award of attorney fees is typically reviewed for an abuse of discretion, the supreme court's plenary review is implicated when questions of law, such as in the interpretation of a contract, are at issue.

23. COSTS.
In general, a district court may not award attorney fees unless authorized to do so by a statute, rule, or contract.

24. COSTS.
Parties are free to provide for an award of attorney fees in a dispute by express contractual provisions.

25. COSTS.
The objective in interpreting a contractual attorney fees provision, as with all contracts, is to discern the intent of the contracting parties, and traditional rules of contract interpretation are employed to accomplish that result.

26. CONTRACTS.
When interpreting a contract, the initial focus is on whether the language of the contract is clear and unambiguous; if it is, the contract will be enforced as written.

27. COSTS.
Award of attorney fees to vendors was warranted in real estate broker's suit against vendors for breach of listing and purchase agreements for property vendors sought to sell and purchase agreement for home vendors purchased; vendors successfully defended against claims of breach, and agreements unambiguously provided that prevailing party was entitled to attorney fees incurred in defense of actions to enforce agreements.

Before SAITTA, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, SAITTA, J.:

In this appeal and cross-appeal, we address several issues arising from a dispute over a series of property transactions. First, we are asked to construe NRS 48.105, which provides that evidence of offers of compromise must be excluded when introduced ''to prove liability for or invalidity of the claim or its amount,'' but also states that exclusion is not required ''when the evidence is offered for another purpose.'' In particular, we consider whether evidence of compromise offers is admissible for the purpose of demonstrating a failure to mitigate damages. Applying the plain language of NRS 48.105, we conclude that compromise offers are not admissible for this purpose because evidence demonstrating a failure to mitigate damages necessarily goes to the ''amount'' of a claim. Accordingly, the district court did not err in excluding such evidence.

Next, we interpret NRS 645.251, which provides, in pertinent part, that real estate licensees are ''not required to comply with any principles of common law that may otherwise apply to any of the duties of the licensee as set forth in NRS 645.252, 645.253 and 645.254.'' Specifically, we address whether NRS 645.251 shields real estate licensees from common law forms of liability. We conclude that although the statute does not, in all instances, shield real estate licensees from common law forms of liability, it precludes such liability when the type of conduct complained of is covered by NRS 645.252, 645.253, or 645.254. Here, because the fraud-by-concealment claim brought against appellant/cross-respondent Cheryl Davis by respondents/cross-appellants Kristen Beling and William Dougherty, Jr. (the Doughertys) is premised on the type of conduct covered in NRS 645.252-645.254, the district court erred in entering judgment on this claim. The court did not err, however, in entering judgment, as to liability, on the Doughertys' NRS 645.257 claim that Davis breached the duties imposed by NRS 645.252-645.254. Nor did the district court err in entering judgment, as to liability, on the Doughertys' NRS 645.257 claim against appellant/cross-respondent Triple Win, LLC, d.b.a. Platinum Properties GMAC Real Estate (Platinum) because that claim is predicated on a theory of liability not covered in NRS 645.252-645.254.

We next address the damages that are recoverable for a real estate licensee's breach of the duties set forth in NRS 645.252-645.254, in light of NRS 645.257's declaration that ''actual damages'' may be recovered for such violations. We conclude that the term ''actual damages'' is synonymous with the term ''compensatory damages.'' Thus, although punitive damages may not be recovered under NRS 645.257, we conclude that compensatory damages are recoverable under the statute in accordance with the measure of damages that appropriately compensates the injured party for the losses sustained as a result of the real estate licensee's violations. In the instant case, the district court did not err in determining that diminution damages were an appropriate measure of the Doughertys' compensatory damages, but it erred in precluding their recovery of the consequential damages necessary to fully compensate them for their losses.

Finally, we address whether the Doughertys are entitled to an award of attorney fees pursuant to the listing and purchase agreements for the properties at issue. We conclude that because the Doughertys successfully defended against the breach of contract claims brought against them under these agreements, they are entitled to an award of attorney fees under the terms of these agreements. Consequently, the district court erred in denying the Doughertys' request for these fees.

FACTS AND PROCEDURAL HISTORY

Background

In 2005, the Doughertys decided to sell their home located on Augusta Drive in Henderson (the Augusta Property) and build a custom home in the MacDonald Highlands development in Henderson. The Doughertys entered into a listing agreement with Davis and Platinum, whereby Davis would serve as the agent for the listing and sale of the Augusta Property and Platinum would act as the broker. The Doughertys explained to Davis that they wished to use the proceeds from the sale of the Augusta Property in order to finance the acquisition of the lot for their custom-built home.

Thereafter, the Doughertys agreed to sell the Augusta Property to Chris and Tracy Byrd. The Byrds provided the Doughertys with an earnest money deposit, and escrow was set to close in a few months. The Doughertys then located a lot in the MacDonald Highlands development on which they wished to build their custom home (the MacDonald Highlands Property). Davis assured the Doughertys that the Byrds would go through with the purchase of the Augusta Property and, relying on these assurances, the Doughertys closed on the MacDonald Highlands Property, despite the fact that the Byrds had not yet closed on the Augusta Property.

The Doughertys needed a place to live during the interim period between the anticipated sale of the Augusta Property and the estimated two-year construction of the MacDonald Highlands Property. Davis convinced the Doughertys that purchasing a property and then selling it at a profit after they moved into the MacDonald Highlands Property would be preferable to renting a residence. Thus, Davis showed the Doughertys a few properties located in Henderson, including a residence located on Ping Drive (the Ping Property). The Doughertys thereafter entered into an agreement to purchase the Ping Property for $825,000. The Doughertys explained to Davis, however, that it was imperative that the closing of the Ping Property be contingent on the closing of the Augusta Property because they needed to use the funds from the sale of the Augusta Property in order to close on the Ping Property. Contrary to these instructions, Davis did not make the Doughertys' offer on the Ping Property contingent.

The planned series of transactions started to unravel when problems began to threaten the closing of the Augusta Property due to the Byrds' difficulty in selling their home. Davis, however, repeatedly represented to the Doughertys that the sale of the Augusta Property had successfully closed. In fact, the sale had not closed, and Davis thereafter called the Doughertys and conceded that the Augusta Property was not closing. Davis explained to the Doughertys that the Byrds were unable to sell their home, and, as a result, they could not purchase the Augusta Property.

The following day, the Doughertys spoke with the Byrds' lender, who informed the Doughertys that the Byrds still wished to purchase the Augusta Property, but that they needed three days to obtain the necessary funds to do so. Immediately thereafter, Davis called the Doughertys and told them that they needed to close escrow on the Ping Property or they would lose their earnest money deposit. By this time, the Doughertys no longer trusted Davis, and they told her that they did not wish to close on the Ping Property because the Augusta Property had not closed. Then, purporting to be acting on behalf of the Byrds, Davis offered to advance the Doughertys the $150,000 needed to close on the Ping Property. Davis told the Doughertys that the Byrds would close on the Augusta Property in a few more days. She then represented that she was placing the money into escrow on behalf of the Byrds for the Augusta Property. Relying on Davis's assurances that she had worked out an arrangement for the Byrds to close on the Augusta Property, the Doughertys accepted the $150,000 advance and closed on the Ping Property. Ultimately, the Byrds were unable to successfully close on the Augusta Property. Afterward, Davis verbally offered to purchase the Ping Property from the Doughertys, but the Doughertys refused.

Proceedings below

Davis sued the Doughertys under various theories of liability, including breach of contract, unjust enrichment, and fraud, seeking to recover the $150,000 that she had advanced to the Doughertys. The Doughertys countersued Davis for, among other things, negligent misrepresentation, fraud by misrepresentation and concealment, breach of fiduciary duty, slander of title, and abuse of process. In addition, the Doughertys brought a claim against Davis under NRS 645.257, which provides a statutory cause of action for the victim of a real estate licensee's breach of the various duties imposed by NRS 645.252-645.254. The Doughertys also sued Platinum under NRS 645.257, based on a respondeat superior theory. Platinum filed a third-party complaint against the Doughertys for breach of the listing and purchase agreements for the Augusta Property and the purchase agreement for the Ping Property.

The Doughertys later rejected an offer of judgment made by Davis. Davis similarly rejected an offer of judgment made by the Doughertys, and the dispute was scheduled for a jury trial. Around this time, the Doughertys filed a motion in limine to exclude evidence of Davis's oral offer to buy the Ping Property, asserting that NRS 48.105(1) requires the exclusion of this evidence. The district court granted the Doughertys' motion. Davis, in turn, filed a motion in limine seeking to prevent the Doughertys from recovering

or presenting evidence relating to their mortgage payments, taxes, insurance, maintenance expenses, and other carrying costs for the Ping Property, offset by their mitigation of those damages by renting the property. Davis asserted that the Doughertys may only recover their out-of-pocket damages, and that the carrying costs for the Ping Property do not fall within this category. Davis also asserted that the economic loss doctrine bars the recovery of such damages. The district court agreed, thereby precluding the Doughertys from recovering their carrying costs. Before the commencement of trial, Davis requested that the district court dismiss the Doughertys' causes of action for fraud and their other common law claims, asserting that such claims are precluded by NRS 645.251. The district court declined to do so.

Following the parties' presentation of their respective cases, the district court dismissed several claims and submitted the remaining claims to the jury by way of special verdict forms. Specifically, the district court submitted Davis's claims against the Doughertys for breach of contract, unjust enrichment, and fraud, along with Platinum's claim against the Doughertys for breach of contract. The district court also submitted the Doughertys' fraud-by-misrepresentation, fraud-by-concealment, abuse of process, slander of title, and NRS 645.257 claims against Davis, as well as the Doughertys' NRS 645.257 claim against Platinum.

Before sending the jury to deliberate, the district court provided it with various instructions, including an instruction regarding the out-of-pocket rule—that is, that the Doughertys' damages should be limited to the difference between the value of what they received and the amount of money that they gave for it. But the special verdict forms that the district court provided to the jury also suggested to the jury that it could award diminution damages to the Doughertys on their fraud and NRS 645.257 claims.

The jury returned a verdict awarding Davis $115,455 on her unjust enrichment claim. It also awarded the Doughertys $199,558.66 on their fraud-by-concealment claim against Davis.[2] In addition, the jury awarded the Doughertys $100,000 in punitive damages on this claim. The jury also awarded the Doughertys $199,558.66 on their NRS 645.257 claim against Davis, but the district court remitted this award, reasoning that it was duplicative of the award on the Doughertys' fraud-by-concealment claim. Finally, the jury awarded the Doughertys $15,273.13 on their NRS 645.257 claim against Platinum, representing the amount of commission

[2]This figure represents the Doughertys' moving expenses ($9,558.66) plus the diminution in value of the Ping Property—that is, the difference between the price the Doughertys paid for the Ping Property in 2005 ($825,000) and the appraised value of the property at the time of trial in 2008 ($635,000).

Platinum received from the Ping Property transaction, along with $22,500 in punitive damages.[3] The jury rejected all other claims, and the district court entered judgment on the jury's verdict.

The Doughertys filed a post-judgment motion for attorney fees, asserting that such an award was authorized by the offer of judgment rule, as well as the listing and purchase agreements for the Augusta Property and the purchase agreement for the Ping Property. The district court awarded attorney fees to the Doughertys under the offer of judgment rule, but it denied their request for fees under the listing and purchase agreements. Davis and Platinum now appeal, challenging various aspects of the district court's judgment. The Doughertys cross-appeal, contending that the district court erred in limiting the amount of their recoverable damages and their attorney fees award.

DISCUSSION

As noted, Davis and Platinum raise several contentions on appeal. Davis first argues that the district court erred in excluding, under NRS 48.105(1), evidence of her offer to purchase the Ping Property from the Doughertys. Next, Davis contends that the district court erred in entering judgment on the Doughertys' fraud-by-concealment claim because NRS 645.251 shields her from all liability for common law causes of action. Platinum similarly contends that the district court erred in entering judgment on the Doughertys' NRS 645.257 claim against it because that claim was predicated on a respondeat superior theory of liability, which it asserts is precluded by NRS 645.251. Finally, Davis asserts that the district court erred in permitting the jury to award the Doughertys diminution damages.[4]

On cross-appeal, the Doughertys argue that the district court erred in precluding their recovery of the carrying costs for the Ping Property. They also assert that the court erred in determining that they are not entitled to attorney fees pursuant to the listing and purchase agreements for the Augusta Property and the purchase agreement for the Ping Property. We address Davis's contentions first.

Davis's offer of compromise

Davis asserts that the district court erred in excluding evidence of her offer to buy the Ping Property, under NRS 48.105, because

---

[3]The jury also awarded the Doughertys damages on their abuse of process claim, but the district court remitted this award after the Doughertys waived their right to these damages.

[4]We have considered each of Davis's and Platinum's remaining contentions and conclude that they are without merit.

she introduced this evidence for the purpose of showing that the Doughertys failed to mitigate their damages. According to Davis, NRS 48.105 does not mandate exclusion in such a circumstance.

[Headnotes 1-5]

Although the district court's determination of the admissibility and relevance of evidence is generally reviewed for an abuse of discretion, *Thomas v. Hardwick*, 126 Nev. 142, 151, 231 P.3d 1111, 1117 (2010), ''to the extent the evidentiary ruling rests on a legal interpretation of the evidence code, de novo review obtains.'' *Stephans v. State*, 127 Nev. 712, 716, 262 P.3d 727, 730 (2011). When construing a statute, we first examine its plain meaning. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252 P.3d 206, 209 (2011). In examining the plain meaning of a statute, we read its provisions as a whole, and give effect to each of its words and phrases. *Id*. ''When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of construction.'' *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010).

[Headnote 6]

An offer of compromise is an offer by one party to settle a claim ''where an actual dispute or a difference of opinion exists'' at the time the offer is made. *Affiliated Mfrs., Inc. v. Aluminum Co. of America*, 56 F.3d 521, 527 (3d Cir. 1995). At the time that Davis offered to buy the Ping Property from the Doughertys, a dispute between the parties had arisen, and Davis cannot seriously contend otherwise. When Davis made her offer, the parties had obtained representation, and as Davis later testified, ''everyone was screaming litigation.'' As such, Davis's offer was clearly an offer of compromise.

Concerning offers of compromise, NRS 48.105 provides:

> 1. Evidence of:
> (a) Furnishing or offering or promising to furnish; or
> (b) Accepting or offering or promising to accept,
> a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim *or its amount*. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.
>
> 2. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

(Emphasis added.)

Thus, NRS 48.105(1) requires the exclusion of evidence of offers of compromise when such evidence is introduced to prove liability or the amount of a claim. But NRS 48.105(2) qualifies the reach of NRS 48.105(1) by providing that the introduction of this evidence is not prohibited if offered for ''another purpose.'' We have not previously addressed whether evidence of an offer of compromise may be introduced for the purpose of demonstrating a failure to mitigate damages.

[Headnote 7]

We conclude that compromise offers are not admissible for this purpose because when evidence of an offer of compromise is used to show a failure to mitigate damages, such evidence inescapably goes to the ''amount'' of the claim. This type of evidence thus falls within the precise proscription set forth by NRS 48.105(1)(b). Therefore, pursuant to the plain language of the statute, offers of compromise are not admissible to prove a failure to mitigate damages.

Our interpretation of NRS 48.105 finds ample support. When faced with this issue, federal circuit courts have concluded, after carefully construing Federal Rule of Evidence 408, the federal counterpart of NRS 48.105, that offers of compromise are not admissible on the issue of mitigation. For instance, in *Stockman v. Oakcrest Dental Center, P.C.*, the United States Court of Appeals for the Sixth Circuit reasoned that ''mitigation necessarily goes to the amount of a claim,'' and therefore, admitting offers of compromise on the issue would ''violate[ ] Rule 408 on its face.'' 480 F.3d 791, 798 (6th Cir. 2007). Similarly, in *Pierce v. F.R. Tripler & Co.*, the United States Court of Appeals for the Second Circuit concluded that ''[e]vidence that demonstrates a failure to mitigate damages goes to the 'amount' of the claim and thus, if the offer was made in the course of compromise negotiations, it is barred under the plain language of Rule 408.'' 955 F.2d 820, 826-27 (2d Cir. 1992).[5]

---

[5]Davis asks that we follow a contrary set of federal decisions and secondary authorities that have suggested that evidence of offers of compromise is admissible on the issue of mitigation. Davis principally relies upon *Bhandari v. First National Bank of Commerce*, 808 F.2d 1082 (5th Cir. 1987), and *Urico v. Parnell Oil Co.*, 708 F.2d 852 (1st Cir. 1983). We find the *Bhandari* decision unpersuasive because it contains virtually no analysis and implies, incorrectly, that Rule 408 merely ''excludes evidence of settlement negotiations if offered to prove or disprove liability.'' 808 F.2d at 1103. The *Urico* case is likewise unconvincing in that it does not address the actual language of FRE 408 to reach the conclusion that the rule provides for ''flexibility'' in the admissibility of compromise offers. 708 F.2d at 854. In short, we are not persuaded to follow these decisions. Instead, we apply NRS 48.105 according to its plain language, as the better-reasoned federal decisions hold, and as our well-established rules of statutory interpretation mandate. *See Arguello*, 127 Nev. at 370, 252 P.3d at 209; *Cromer*, 126 Nev. at 109, 225 P.3d at 790.

[Headnote 8]

Moreover, the admission of evidence of compromise offers would not only violate the plain language of NRS 48.105(1)(b), it would undermine one of the statute's undisputed purposes, specifically, to prevent evidence of settlement efforts from '' 'haunt[ing] a future legal proceeding.' '' *Morrison v. Beach City LLC*, 116 Nev. 34, 39, 991 P.2d 982, 985 (2000) (quoting *Han v. Yang*, 931 P.2d 604, 613 (Haw. Ct. App. 1997)). Because the issue of mitigation centers on whether the injured party exercised reasonable care to avoid unnecessary damages, *see Automatic Merchandisers, Inc. v. Ward*, 98 Nev. 282, 284, 646 P.2d 553, 554 (1982), if evidence of compromise offers were admitted to show a failure of mitigation, then predictably, a substantial dispute would arise over whether the offer was reasonably refused.

The facts of this case dramatically illustrate this concern. There is absolutely no indication that Davis was in a position to produce, on a moment's notice, the $825,000 necessary to purchase the Ping Property. And, in view of Davis's dishonesty in the parties' previous dealings, it can hardly be said that it was unreasonable for the Doughertys to refuse to enter into yet another transaction involving her. Thus, if evidence of Davis's offer of compromise were admitted, the Doughertys would have every reason to show just how tenuous the offer was, and a lengthy dispute over the issue could ensue, which is an outcome that NRS 48.105 was specifically intended to prevent. *See Morrison*, 116 Nev. at 39, 991 P.2d at 985.

We also share the Second Circuit's concern in *Pierce* that the admission of such evidence would inhibit the efficient administration of justice by spurring a ''rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial.'' 955 F.2d at 828. As the court explained, because it is commonplace for attorneys to be closely involved in the parties' settlement efforts before trial, ''many attorneys would be forced to testify as to the nature of the discussions and thus be disqualified as trial counsel.'' *Id.*

We therefore conclude that under NRS 48.105, evidence of offers of compromise is not admissible to demonstrate a failure to mitigate damages. Accordingly, the district court did not err in excluding evidence of Davis's offer to purchase the Ping Property from the Doughertys.

The Doughertys' fraud-by-concealment and NRS 645.257 claims

Davis asserts that the district court erred in entering judgment on the Doughertys' fraud-by-concealment claim because, as she interprets it, NRS 645.251 shields real estate licensees from any and all common law forms of liability. Similarly, Platinum asserts that NRS 645.251 precludes all common law forms of liability, and that the district court thus erred in entering judgment against it on the

Doughertys' NRS 645.257 claim, as this claim is premised on respondeat superior—a common law theory of liability.

[Headnotes 9, 10]

''[Q]uestions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo.'' *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). However, the fact-finder's ''fact-based conclusions of law are entitled to deference, and . . . will not be disturbed if supported by substantial evidence.'' *Manwill v. Clark County*, 123 Nev. 238, 241, 162 P.3d 876, 879 (2007).

NRS 645.251 provides, in relevant part, that ''[a] licensee is not required to comply with any principles of common law that may otherwise apply to any of the duties of the licensee as set forth in NRS 645.252, 645.253 and 645.254.'' NRS 645.252 sets forth the general duties of care and disclosure of real estate licensees. NRS 645.253 describes the duties of nondisclosure of licensees affiliated with the same brokerage. Lastly, NRS 645.254 provides additional duties of care, disclosure, and nondisclosure of licensees who have entered into a brokerage agreement to represent a client in a real estate transaction.

Although we conclude that NRS 645.251 alters the traditional landscape of liability with respect to real estate licensees, we disagree with Davis's and Platinum's contention that the statute precludes, in all instances, common law forms of liability, such as fraud. Simply put, NRS 645.251 does not state that real estate licensees are shielded from all forms of common law liability, and therefore, Davis's and Platinum's interpretation of NRS 645.251 is overbroad and improperly reads language into the statute. *See Szydel v. Markman*, 121 Nev. 453, 457, 117 P.3d 200, 202 (2005) (''When the language of a statute is clear on its face, this court will deduce the legislative intent from the words used.'').

[Headnote 11]

Nonetheless, NRS 645.251 expressly limits a real estate licensee's duties of care and disclosure to those specifically set forth in NRS 645.252-645.254. NRS 645.251 would be rendered meaningless if a party could circumvent this limitation by simply casting a claim for a violation of NRS 645.252-645.254 as a common law claim. We therefore conclude that NRS 645.251 precludes common law claims against real estate licensees to the extent that the type of conduct forming the basis of such a claim is the type of conduct proscribed in NRS 645.252-645.254. Stated differently, NRS 645.251 displaces common law forms of liability when the type of conduct complained of overlaps with the conduct covered by NRS 645.252-645.254. Thus, although NRS 645.251 does not abrogate all common law claims for a real estate li-

censee's wrongful conduct, such claims remain viable only if the type of conduct complained of is not covered by NRS 645.252-645.254.

[Headnotes 12, 13]

The Doughertys' fraud-by-concealment claim is predicated on Davis's failure to disclose material information regarding their various real estate transactions. The duties of disclosure of real estate licensees are covered by NRS 645.252(1) and NRS 645.254(5). Thus, the type of conduct forming the basis of the Doughertys' fraud-by-concealment claim overlaps with the type of conduct covered by NRS 645.252(1) and NRS 645.254(5), and therefore, as a matter of law, this conduct cannot form the basis of a common law fraud-by-concealment claim against Davis. Consequently, we conclude that the district court erred in entering judgment on this claim. However, as substantial evidence supports the jury's finding in favor of the Doughertys on their NRS 645.257 claim against Davis for breach of the statutory duties set forth in NRS 645.252-645.254, the district court did not err in entering judgment, as to liability, on the statutory claim.

[Headnote 14]

In contrast to the type of conduct forming the basis of the Doughertys' fraud-by-concealment claim, respondeat superior liability is not covered in NRS 645.252, 645.253, or 645.254. Indeed, those statutes have nothing to do with such liability. Platinum's contention that NRS 645.251 precludes its respondeat superior liability for Davis's wrongdoing is therefore without merit. Accordingly, because substantial evidence supports the jury's finding that Platinum is liable under a respondeat superior theory, the district court did not err in entering judgment, as to liability, on the Doughertys' NRS 645.257 claim against Platinum.

The Doughertys' recoverable damages

Davis contends that the district court erred in permitting the jury to award diminution damages to the Doughertys. Specifically, she asserts that the Doughertys' recovery should be measured by their out-of-pocket losses. Davis further argues that the diminution in the value of the Ping Property is an improper measure of the Doughertys' damages because the drop in value of the Ping Property was proximately caused by the decline in the Las Vegas real estate market, not her actions.[6]

---

[6]Davis also argues that the Doughertys waived any claim to damages in the purchase agreements for the Augusta Property and the Ping Property. This argument is meritless. The waiver provisions contained in the purchase agreements relate to claims arising from defects in the condition of the properties, not intentional torts or a breach of statutory duties.

On cross-appeal, the Doughertys argue that the district court erred in precluding their recovery of the carrying costs for the Ping Property. They further argue that the district court erred in determining that their recovery of these damages is barred by the economic loss doctrine.

[Headnote 15]

As both parties' arguments require that we address the damages that are recoverable on the Doughertys' NRS 645.257 claims and the measure that should be used to compute those damages, we take up these issues together. ''Whether a party is 'entitled to a particular measure of damages is a question of law' reviewed de novo.'' *Dynalectric Company v. Clark & Sullivan*, 127 Nev. 480, 483, 255 P.3d 286, 288 (2011) (quoting *Toscano v. Greene Music*, 21 Cal. Rptr. 3d 732, 736 (Ct. App. 2004)).

NRS 645.257

With respect to the damages that may be recovered under NRS 645.257, the statute provides, in pertinent part:

> A person who has suffered damages as the proximate result of a licensee's failure to perform any duties required by NRS 645.252, 645.253 or 645.254 . . . may bring an action against the licensee for the recovery of the person's *actual damages*.

(Emphasis added.)

[Headnote 16]

The Legislature did not define the term ''actual damages,'' nor have we previously interpreted it. Typically, ''actual damages'' are defined as ''[a]n amount awarded to a complainant to compensate for a proven injury or loss.'' *Black's Law Dictionary* 445 (9th ed. 2009). The term is often ''[a]lso termed *compensatory damages*.'' *Id*. Thus, ''actual damages'' is simply another way of stating ''compensatory damages.'' Indeed, the term is generally understood by courts to be synonymous with ''compensatory damages,'' *see, e.g.*, *Saunders v. Taylor*, 50 Cal. Rptr. 2d 395, 398 (Ct. App. 1996), and therefore, this is how we believe it should be construed. *See Beazer Homes Nevada, Inc. v. Dist. Ct.*, 120 Nev. 575, 580-81, 97 P.3d 1132, 1135-36 (2004) (''When a legislature adopts language that has a particular meaning or history, rules of statutory construction . . . indicate that a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language.''). It follows that, linguistically, the term simply operates to distinguish compensatory damages from other broad types of damages, such as punitive damages. Accordingly, we conclude that although punitive damages may not be recovered for statutory claims brought pursuant to

NRS 645.257, the Legislature intended to permit the recovery of compensatory damages for such actions. Below, we address the appropriate measure of compensatory damages for the Doughertys' NRS 645.257 claims.

Diminution damages

As previously noted, Davis contends that the Doughertys' compensatory damages should not be measured by their diminution damages, but instead should be ascertained by their out-of-pocket losses, which is a measure of damages used in fraud cases. While we agree that, under the particular facts of this case, it is appropriate to determine the Doughertys' compensatory damages under NRS 645.257 by general reference to the measure of damages for fraud, Davis's contention that this means the Doughertys' recovery is limited to their out-of-pocket losses does not withstand scrutiny.

To be sure, the out-of-pocket measure, which, in the misrepresentation context, is comprised of ''the difference between what [the defrauded party] gave and what he actually received,'' is frequently used to compute the damages for fraud. *Collins v. Burns*, 103 Nev. 394, 398-99, 741 P.2d 819, 822 (1987). The benefit-of-the-bargain measure, which consists of ''the value of what [the defrauded party] would have received had the representations been true, less what he actually received,'' is also often utilized to calculate damages in fraud cases. *Id.* at 398, 741 P.2d at 822. ''Sometimes, however, neither the out-of-pocket nor benefit-of-the-bargain measure is particularly helpful or appropriate.'' *Strebel v. Brenlar Investments, Inc.*, 37 Cal. Rptr. 3d 699, 705 (Ct. App. 2006). As the California Court of Appeal has observed, these measures are often mistakenly portrayed ''as being the sole antagonists on the battlefield of damages when at times neither is truly applicable.'' *Overgaard v. Johnson*, 137 Cal. Rptr. 412, 413 (Ct. App. 1977).

In *Strebel*, the court explained that a circumstance in which the out-of-pocket rule and the benefit-of-the-bargain measure may both be inapplicable is where, as here, ''the facts that were fraudulently concealed . . . [have] nothing to do with the value of the [property].'' 37 Cal. Rptr. 3d at 705. Accordingly, in *Strebel*, the court concluded that a homeowner who was fraudulently induced by his real estate agent into selling his home was properly awarded damages constituting the appreciation that he would have accrued had he not sold his home, rather than his more limited out-of-pocket damages. *Id.* at 706.

In reaching this conclusion, the *Strebel* court rejected the same argument that Davis advances here, namely, that ''damages proximately caused by fraud are determined as of the date when the fraud took effect—not by a later increase or decline in value.'' *Id.* (internal quotation marks omitted). The court rejected this argu-

ment for many reasons. First and foremost, ''measuring [the homeowner's] damages at the time of the sale would provide no compensation for the most significant portion of the loss he suffered as a result of defendants' fraud.'' *Id.* at 707. Next, the fraud was perpetrated by a real estate agent—a fiduciary that has a broad responsibility to compensate his or her clients. *Id.* at 708. Additionally, in contrast to situations involving a tortfeasor who merely acts with negligence, ''[a]llowing recovery for lost appreciation . . . provide[s] a significant deterrent to a real estate agent fraudulently misleading prospective buyers under similar circumstances in the future.'' *Id.* Finally, the jury was correctly instructed on the issue of proximate cause, and substantial evidence supported the jury's finding that the homeowner's lost appreciation damages were substantially related to the defendants' fraud. *Id.* We find the *Strebel* court's analysis sound and instructive on the appropriate measure of compensatory damages in this case because measuring damages based on loss of appreciation is conceptually analogous to measuring damages based on diminution.

[Headnote 17]

Here, as in *Strebel*, the vast majority of the Doughertys' losses were incurred after the date of Davis's wrongdoing. Rigidly measuring the Doughertys' damages as of the date of Davis's transgressions would thus defeat the irrefutable goal of compensatory damages. *See Hanneman v. Downer*, 110 Nev. 167, 172-73, 871 P.2d 279, 283 (1994) (''[D]amages are awarded to make the aggrieved party whole . . . .''). And, as in *Strebel*, Davis is a fiduciary with a heightened responsibility to compensate the clients who she deceived. *See Holland Rlty. v. Nev. Real Est. Comm'n*, 84 Nev. 91, 97, 436 P.2d 422, 425 (1968) (the consequences of a real estate licensee's breach of trust are the same as those ''that are provided for a disloyal or recreant trustee''); *Pepitone v. Russo*, 134 Cal. Rptr. 709, 711 (Ct. App. 1976) (''[T]he faithless fiduciary is obligated to make good the full amount of the loss of which his breach of faith is a cause.''). Finally, as in *Strebel*, Davis did not act with mere negligence; rather, the record shows that she acted intentionally, and she will therefore be deterred from misleading clients in the future if she is made to compensate the Doughertys for their diminution damages. *Cf. Safeco Ins. Co. v. J & D Painting*, 21 Cal. Rptr. 2d 903, 907 (Ct. App. 1993) (rejecting award of diminution damages for a negligence claim); *Goodrich & Pennington v. J.R. Woolard*, 120 Nev. 777, 781, 101 P.3d 792, 795 (2004) (indicating that liability for negligent misrepresentation ''may not extend to losses arising from a subsequent downturn in the real estate market''). Accordingly, we conclude that the district court did not err in determining that the diminution

in the value of the Ping Property was an appropriate measure of compensatory damages for the Doughertys' NRS 645.257 claims.[7]

Consequential damages

We now turn to the Doughertys' contention that the district court erred in precluding their recovery of the carrying costs for the Ping Property. The Doughertys assert that these costs constitute consequential damages that may be recovered, in addition to diminution damages, in order to fully compensate them for their losses.

As a leading remedies treatise explains, in order to fully and fairly compensate the victim of fraud, he or she ''may recover special or consequential damages caused by the misrepresentation, in addition to the recovery under the appropriate general damages measure.'' 2 Dan B. Dobbs, *Law of Remedies* § 9.2(3) (2d ed. 1993).

> Consequential damages include items of expense reasonably incurred to minimize the effects of the fraud, damages caused to other property suffered because of the fraud, travel expenses incurred to deal with the problem, commissions paid or added tax burdens, and other items of loss or expense not adequately reflected in the general damages recovery based on market value of the property itself.

Id. (footnotes omitted).

[Headnotes 18, 19]

Here, the carrying costs for the Ping Property are damages that the Doughertys incurred to minimize the effects of Davis's deceptions. It was preeminently reasonable for the Doughertys to obtain property insurance for the Ping Property, pay the taxes and mortgage on the property, and maintain the property. Indeed, if they had not done so, they would likely be deemed to have failed to mitigate their damages. The Doughertys' carrying costs are thus consequential damages that are a recoverable component of their compensatory damages.[8]

---

[7]We caution that a party seeking to recover diminution damages may not unfairly profit from a defendant's wrongdoing by delaying filing suit during an economic downturn. *See Strebel*, 37 Cal. Rptr. 3d at 709. Davis does not, however, advance any argument that the Doughertys did so here.

We also note that in order to prevent a double recovery, any damages the Doughertys are awarded should be reduced by the amount of payments that they received from renting the Ping Property. *See generally Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 444, 245 P.3d 547, 549 (2010) (''[A] plaintiff can recover only once for a single injury.'').

[8]We note that consequential damages may not be awarded when they are duplicative of the general damages awarded—that is, when they ''have been ac-

The economic loss doctrine

We also agree with the Doughertys' contention that the district court erred in determining that their recovery of these carrying costs is barred by the economic loss doctrine. The economic loss doctrine is a rule of judicial creation that, broadly speaking, '' 'marks the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby [generally] encourages citizens to avoid causing physical harm to others.' '' *Terracon Consultants v. Mandalay Resort*, 125 Nev. 66, 72-73, 206 P.3d 81, 86 (2009) (alteration in original) (quoting *Calloway v. City of Reno*, 116 Nev. 250, 256, 993 P.2d 1259, 1263 (2000), *overruled on other grounds by Olson v. Richard*, 120 Nev. 240, 241-44, 89 P.3d 31, 31-33 (2004)). Consistent with this purpose, the doctrine primarily functions to bar the recovery of purely monetary losses in certain products liability and unintentional tort actions. *Id.* at 73, 206 P.3d 86.

[Headnote 20]

The economic loss doctrine does not, however, bar the recovery of purely economic losses when the defendant intentionally breaches a duty that is imposed independently of the obligations arising from contract. *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987); *see Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 879 (9th Cir. 2007) (meticulously analyzing Nevada's economic loss doctrine jurisprudence and explaining that in Nevada, as in most jurisdictions, the doctrine does not bar claims ''where the defendant had a duty imposed by law rather than by contract and where the defendant's intentional breach of that duty caused purely monetary harm to the plaintiff''). After all, it is often the case that claims stemming from a defendant's intentional wrongdoing, '' 'such as fraud and conversion[,] *exist* to remedy purely economic losses.' '' *Id.* at 875 (quoting *Grynberg v. Questar Pipeline Co.*, 70 P.3d 1, 11 (Utah 2003)).

[Headnote 21]

Here, although the parties had agreements regarding the Augusta Property and the Ping Property, the Doughertys' NRS 645.257 claims are not based upon a breach of an obligation arising from those agreements. Rather, the Doughertys' NRS 645.257 claims are predicated upon Davis's intentional breach of separate duties, distinct from those arising from the parties' contractual

---

counted for already by the general damages recovery.'' 2 Dan B. Dobbs, *Law of Remedies* § 9.2(3) (2d ed. 1993). Here, the carrying costs of the Ping Property compensate the Doughertys for a component of their losses that are not reflected by the diminution measure. As such, the Doughertys' carrying costs are not duplicative.

dealings, not to violate the statutory provisions governing real estate licensees. The economic loss doctrine, therefore, does not apply to the Doughertys' NRS 645.257 claims. Consequently, we conclude that the district court erred in precluding the Doughertys from recovering the carrying costs for the Ping Property.

The Doughertys' recovery of attorney fees pursuant to the parties' listing and purchase agreements

The Doughertys next argue that the district court erred in determining that they are not entitled to an award of attorney fees pursuant to the listing and purchase agreements for the Augusta Property and the purchase agreement for the Ping Property. In particular, they assert that although the district court awarded them attorney fees under the offer of judgment rule, they are entitled to an additional award of fees under the terms of these agreements for their successful defense of Davis's and Platinum's breach of contract actions.

[Headnote 22]

While the district court's award of attorney fees is typically reviewed for an abuse of discretion, *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005), our plenary review is implicated when questions of law, such as in the interpretation of a contract, are at issue. *Benchmark Insurance Company v. Sparks*, 127 Nev. 407, 411, 254 P.3d 617, 620 (2011); *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 9, 106 P.3d 1198, 1199 (2005).

[Headnotes 23-26]

In general, a district court may not award ''attorney fees . . . unless authorized to do so by a statute, rule or contract.'' *U.S. Design & Constr. v. I.B.E.W. Local 357*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). Parties are free to provide for attorney fees by express contractual provisions. *See Musso v. Binick*, 104 Nev. 613, 614, 764 P.2d 477, 477 (1988). The objective in interpreting an attorney fees provision, as with all contracts, ''is to discern the intent of the contracting parties.'' *Cline v. Rocky Mountain, Inc.*, 998 P.2d 946, 949 (Wyo. 2000). ''[T]raditional rules of contract interpretation [are employed] to accomplish that result.'' *Id.* Therefore, the initial focus is on whether the language of the contract is clear and unambiguous; if it is, the contract will be enforced as written. *Ellison v. C.S.A.A.*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990).

[Headnote 27]

Here, the Augusta Property listing agreement provides:

> ATTORNEYS FEES: In the event suit is brought by either party to enforce this Agreement, the prevailing party is entitled to court costs and reasonable attorneys fees.

Likewise, the purchase agreements for the Augusta Property and the Ping Property each state:

> Should any party hereto retain counsel for the purpose of initiating litigation to enforce or prevent the breach of any provision hereof, or for any other judicial remedy, then the prevailing party shall be entitled to be reimbursed by the losing party for all costs and expenses incurred thereby, including, but not limited to, reasonable attorneys fees and costs incurred by such prevailing party.

The language of these agreements is clear and unambiguous. All three agreements provide, in straightforward language, that in the event suit is brought to enforce the agreements, the prevailing party is entitled to attorney fees incurred in defense or prosecution of the action. Thus, because the Doughertys successfully defended against Davis's and Platinum's breach of contract actions, pursuant to the clear language of these agreements, the Doughertys are entitled to recover reasonable attorney fees incurred in defense of those particular claims. *See Valley Elec. Ass'n*, 121 Nev. at 10, 106 P.3d at 1200 (explaining that parties ''prevail'' if they succeed on any substantial aspect of the case and noting that the term ''prevailing party'' ''is broadly construed so as to encompass plaintiffs, counterclaimants, and defendants''). Accordingly, we conclude that the district court erred in denying the Doughertys' motion for attorney fees under these agreements.[9]

CONCLUSION

We reverse the district court's judgment on the Doughertys' fraud-by-concealment claim. We affirm the district court's judgment, as to liability, on the Doughertys' NRS 645.257 claims against Davis and Platinum, but vacate the damages awarded and remand those claims for further proceedings consistent with this opinion. The district court's judgment is affirmed in all other respects. Finally, we reverse in part the district court's post-judgment order partially denying the Doughertys' motion for attorney fees and direct the district court to determine the reasonable amount of attorney fees to which the Doughertys are entitled pursuant to the parties' listing and purchase agreements.

HARDESTY and PARRAGUIRRE, JJ., concur.

---

[9]We instruct the district court that the Doughertys are only entitled to receive additional fees beyond those that they already received under the offer of judgment rule. In other words, the court should ensure that the Doughertys do not receive a double recovery of attorney fees.

PAUL CHOY, APPELLANT, *v.* AMERISTAR CASINOS, INC., A NEVADA CORPORATION, RESPONDENT.

No. 56281

June 28, 2012 279 P.3d 191

Petition for en banc reconsideration of panel opinion affirming district court summary judgment in a tort action. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Petition for en banc reconsideration denied.

Nersesian & Sankiewicz and *Robert A. Nersesian* and *Thea Marie Sankiewicz*, Las Vegas, for Appellant.

Pisanelli Bice, PLLC, and *Todd L. Bice* and *Jarrod L. Rickard*, Las Vegas, for Respondent.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

Appellant Paul Choy filed a complaint in district court alleging various tort claims against respondent Ameristar Casinos, Inc., arising out of Choy's alleged detention by security guards at the Ameristar Casino Hotel Kansas City in Missouri. After Ameristar Casinos, Inc., filed a motion for summary judgment, Choy filed an opposition that included a paragraph arguing that under NRCP 56(f) the summary judgment motion should be continued to allow for discovery. The district court denied Choy's request to continue the motion to allow for discovery and granted summary judgment.

On appeal, Choy argued that the district court erred in denying his request under NRCP 56(f) and granting summary judgment. This court issued an opinion affirming the district court's order granting summary judgment and denying Choy's NRCP 56(f) request, holding that Choy failed to substantially comply with NRCP 56(f)'s requirement that the party opposing a motion for summary judgment and seeking a denial or continuance of the motion in order to conduct further discovery must provide an affidavit giving the reasons why the party cannot present ''facts essential to justify the party's opposition.'' *Choy v. Ameristar Casinos*, 127 Nev. 870, 872, 265 P.3d 698, 700 (2011). Choy thereafter filed a timely petition for rehearing, which was denied. Choy then filed this timely petition for en banc reconsideration.

En banc reconsideration is appropriate when needed to preserve precedential uniformity or the matter presents issues involving

substantial precedential, constitutional, or public policy value. NRAP 40A(a). Choy contends this court's precedent did not require parties to comply with NRCP 56(f)'s affidavit requirement, citing to *Halimi v. Blacketor*, 105 Nev. 105, 106, 770 P.2d 531, 531 (1989), in support of his argument. To the extent that *Halimi* is inconsistent with the text of NRCP 56(f) and this court's holding in *Choy*, that parties must substantially comply with NRCP 56(f)'s affidavit requirement, we disapprove of the holding in *Halimi*.

Choy has failed to demonstrate that en banc reconsideration is warranted in this appeal, and the petition is therefore denied.[1]

CHERRY, C.J., and SAITTA, GIBBONS, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., DBA PIC WISCONSIN, APPELLANT, *v.* GLENN WILLIAMS, RESPONDENT.

No. 54126

June 28, 2012 279 P.3d 174

Appeal from a district court summary judgment for declaratory relief in an insurance action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Patient of insured dentist brought action against dentist's claims-made professional liability insurer seeking payment for malpractice claim against dentist. The district court granted summary judgment in favor of patient. Insurer appealed. On an issue of apparent first impression, the supreme court, PICKERING, J., held that news report of dentist's arrest did not constitute a claim that triggered coverage.

Reversed and remanded.

Lewis & Roca LLP and *Daniel F. Polsenberg, Joel D. Henriod*, and *Jacqueline A. Gilbert*, Las Vegas, for Appellant.

Hutchison & Steffen, LLC, and *Michael K. Wall* and *Todd L. Moody*, Las Vegas, for Respondent.

1. INSURANCE.
A court may not rewrite a policy under the guise of construing it.

---

[1]The remaining arguments made by Choy in his petition also fail to demonstrate that en banc reconsideration is warranted.

2. INSURANCE.
   An occurrence-based policy provides broader coverage but at greater cost to the insured than a claims-made policy.
3. INSURANCE.
   The event that invokes coverage under a claims-made policy is transmittal of notice of the claim during the policy period to the insurance carrier.
4. INSURANCE.
   The supreme court will not rewrite insurance contract provisions that are otherwise unambiguous or attempt to increase the legal obligations of the parties where the parties intentionally limited such obligations.
5. INSURANCE.
   News accounts of insured dentist's use of street cocaine in his dental practice, his subsequent arrest, and his loss of professional license was not sufficient to trigger coverage under claims-made professional liability policy for dental malpractice claim stemming from use of cocaine to anesthetize root canal patient; although policy allowed a third-party report of potential claim for damages to qualify as a claim, the news accounts mentioned a practice that, if actually engaged in, was illegal and wrong, however, they did not identify when the practice occurred, whether patients suffered injury as a result, and if so, who the injured patients were and what their anticipated injuries might have been.
6. INSURANCE.
   Allowing coverage to be triggered by broadly phrased, innocuous, or nonspecific statements, would permit an unbargained-for expansion of the policy, undermining the key distinguishing characteristic of a claims-made policy, reduced exposure for the insurer, and lower premiums for the insured.
7. INSURANCE.
   The duty to investigate is an extension of the duty of good faith and fair dealing that the insurer owes its insured and, in a claims-made-and-reported policy, extends to the handling of reported claims, not claims that the insurer might unearth.
8. INSURANCE.
   For a report of a potential demand for damages to qualify as a claim under a claims-made policy, sufficient specificity to alert the insurer's claim department to the existence of a potential demand for damages arising out of an identifiable incident is required, involving an identified or identifiable claimant or claimants, with actual or anticipated injuries.

Before CHERRY, C.J., GIBBONS and PICKERING, JJ.

OPINION

By the Court, PICKERING, J.:

This appeal involves the interpretation of a claims-made professional liability insurance policy that appellant Physicians Insurance Company of Wisconsin, Inc., d.b.a. PIC Wisconsin (PIC), issued to nonparty dentist Hamid Ahmadi, D.D.S. The policy covers dental malpractice claims made against Dr. Ahmadi and reported to PIC during the policy period. On cross-motions for summary

judgment, the district court determined that PIC received constructive notice of respondent Glenn Williams's malpractice claim against Dr. Ahmadi while the policy was in force and held that this was enough to trigger coverage. Our review is de novo, *Powell v. Liberty Mutual Fire Ins. Co.*, 127 Nev. 156, 161, 252 P.3d 668, 672 (2011) (citing *Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003) (insurance policy interpretation presents a question of law); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (summary judgment review is de novo)), and we reverse.

I. *FACTS*

Williams recovered a $480,260 default judgment against Dr. Ahmadi. His complaint alleged that, without his knowledge or consent, Dr. Ahmadi used street cocaine to anesthetize Williams's gums during a 2002 root canal. A short time later, Williams sideswiped a residential gas meter while driving a cement truck for work. His employer subjected him to a mandatory drug test, which came back positive for cocaine. Williams had never used cocaine, and he asked Dr. Ahmadi if the root canal medications might have caused a false-positive test result. Dr. Ahmadi acknowledged the possibility and wrote Williams's employer to suggest this explanation for the positive drug test result, but the employer was unconvinced. As a result, Williams lost his job and his 20-year career as a union truck driver.

The PIC policy had a retroactive date of April 13, 1998, and, through renewals, its coverage extended to April 14, 2004. Williams filed suit against Dr. Ahmadi on April 15, 2004, the day after the PIC policy expired. Earlier, on February 6, 2004, while the policy was still in force, Williams sent Dr. Ahmadi a demand letter by certified mail. Dr. Ahmadi neither responded to Williams nor alerted PIC to the demand or the suit that followed. Five months after the policy expired, Williams, through his lawyer, made demand directly on PIC.

Meanwhile, Dr. Ahmadi's personal and professional life had spun out of control. In December 2003, California authorities arrested him for possession of 57.8 grams (roughly two ounces) of cocaine and charged him with drug trafficking. A month later, the Nevada State Board of Dental Examiners obtained a stipulated order suspending his dentistry license. And on April 13, 2004, Washington authorities arrested Dr. Ahmadi for prescribing painkillers to himself in phony patient names.

PIC learned about Dr. Ahmadi's meltdown anecdotally. An entry in its file log dated January 20, 2004, notes: ''Joanie heard on news last nite that [Dr. Ahmadi] has been charged w/ giving pa-

tients cocaine.'' Around the same time, Dr. Ahmadi reported an office burglary in which expensive equipment was stolen (PIC also insured this risk). Because there were no signs of forced entry, PIC became suspicious and hired an investigator. The investigation turned up, among other things, two brief newspaper accounts of Dr. Ahmadi's drug-trafficking arrest. One article reported that Dr. Ahmadi told the arresting officers that he did not sell cocaine but kept it for personal use and for use in his dental practice and that the Nevada State Board of Dental Examiners was ''investigating the allegations that Ahmadi used cocaine himself and if he used it on his patients.''[1] The second article reported that Dr. Ahmadi's dental license had been suspended. PIC received fax copies of the articles in March 2004; a few days later, PIC obtained a copy of the stipulated order suspending Dr. Ahmadi's license.

Dr. Ahmadi's license suspension gave PIC grounds to cancel the policy and/or to assess an additional premium for continued coverage.[2] On April 2, 2004, PIC gave Dr. Ahmadi written notice of cancellation ''due to the change in the status of your dental license as ordered by the Nevada State Board of Dental Examiners.'' It offered Dr. Ahmadi renewal coverage through June 2, 2004, and an extended reporting endorsement or ''tail'' coverage beyond that, contingent on Dr. Ahmadi paying additional premiums of $199 and $2,862, respectively. Dr. Ahmadi paid neither, and the policy expired on April 14, 2004.

When Williams later made direct demand on PIC, the company took the position that coverage did not exist because the claim had not been made and reported during the policy period. Williams responded by filing the suit underlying this appeal. After discovery, the district court granted in part and denied in part the parties' cross-motions for summary judgment. The district court held that Williams did not have a direct right of action against PIC to enforce his default judgment against Dr. Ahmadi. Nonetheless, it granted Williams declaratory relief, holding that Williams's claim had been made and reported during the policy period:

> In consideration of the language used in the policy in place, the totality of the information in the possession of [PIC], coupled with the nature of the information and the manner in

---

[1]The Nevada State Board of Dental Examiners interviewed Dr. Ahmadi's staff early on. One saw Dr. Ahmadi cook and smoke cocaine at work, while others reported weight loss and bizarre mood swings.

[2]Section H.1. of the policy states that ''any [official] inquiry or action affecting your license to provide professional health care services . . . may result in our need to assess an additional premium charge or to restrict, or cancel all, coverages provided by this policy.''

> which it was received, constitutes a timely claim having been made on behalf of Mr. Williams pursuant to the terms of the claims-made professional dental liability insurance policy.

PIC appeals.[3]

II. *DISCUSSION*

[Headnote 1]

The PIC policy is a claims-made-and-reported malpractice policy. For coverage, a claim must be made and reported within the policy period. In granting Williams declaratory relief, the district court focused on the policy's definition of ''claim'' without considering its insuring agreement clause and related provisions. This was error, in that the decision interpreted ''claim'' more broadly than the policy's language reasonably allows and effectively recast the policy from a claims-notice policy to an occurrence-notice policy. A court may not rewrite a policy under the guise of construing it. *See Griffin v. Old Republic Ins. Co.*, 122 Nev. 479, 483, 133 P.3d 251, 254 (2006).

A. *Occurrence versus claims-made coverage*

[Headnotes 2, 3]

An occurrence-based policy provides broader coverage but at greater cost to the insured than a claims-made policy. Under an occurrence policy, ''it is irrelevant whether the resulting claim is brought against the insured during or after the policy period, as long as the injury-causing event happens during the policy period.'' 1 Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 8.03[a], at 638 (15th ed. Supp. 2011). ''By contrast, the event that invokes coverage under a 'claims made' policy is transmittal of notice of the claim [during the policy period] to the insurance carrier.'' *Zuckerman v. Nat. Union Fire Ins.*, 495 A.2d 395, 406 (N.J. 1985).

Claims-made policies come in several varieties. ''The most restrictive type of claims-made policy is one that requires not only that the claim be both made and reported to the insurer during the policy period, but also that the claim arise out of wrongful acts that take place after the inception of the policy and during

---

[3]Although Williams did not cross-appeal the order denying him standing to directly enforce the Ahmadi default judgment against PIC, PIC does not argue that this disables Williams from defending his declaratory judgment as to timeliness. Also, neither side argued in the district court that issues of fact precluded summary judgment as to timeliness. *See Schuck v. Signature Flight Support*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) (a party opposing summary judgment on the grounds that disputed issues of fact exist must identify them in the district court).

the policy period.'' Ostrager & Newman, *supra*, § 4.02[b], at 165. Some claims-made-and-reported policies contain ''awareness'' or ''discovery'' provisions. Such provisions ''allow the insured to report *potential* claims or events, acts or circumstances that the insured reasonably believes may give rise to a claim against it in the future.'' *Id.* at 166. This affords an insured ''additional protection for a claim or suit that may not be brought until years after the policy has expired, as long as the insured provided notice to the insurer, during the policy period, of the facts, circumstances, or events out of which the claim or suit arises.'' *Id.*

The limited-coverage drawback of claims-made insurance ''is not without a corresponding benefit to the insured: in claims made policies, risk exposure is terminated at a fixed point and, as a result, 'underwriters may more accurately predict an insurer's potential liability. This decreased risk allows insurers to supply claims made policies at a lower price, thereby benefitting insureds.' '' *Simpson & Creasy, P.C. v. Continental Cas. Co.*, 770 F. Supp. 2d 1351, 1355 (S.D. Ga. 2011) (quoting Gerald P. Dwyer, Jr., *Appleman on Insurance Law and Practice* § 4.04[4][d][1] (2010)).

> The knowledge that after a certain date the insurer is no longer liable for newly reported claims under a claims-made policy enables the insurer to fix its reserves more accurately for future liabilities and to compute premiums with greater certainty. By limiting the maximum ''tail'' exposure period, the insurer also avoids the increased risks associated with future inflation, the prospect of increasing jury awards, and unanticipated changes in the substantive law. Thus, the premiums on claims-made policies can be set at lower rates than comparable coverage under an occurrence form.

Ostrager & Newman, *supra*, § 4.02[b], at 162-63 (citations omitted) (internal quotation marks omitted); *see American Cas. Co. v. Continisio*, 17 F.3d 62, 68 (3d Cir. 1994) (''Claims-made policies are less expensive because underwriters can calculate risks more precisely since exposure ends at a fixed point.'').

The Nevada Legislature has recognized that claims-made insurance plays an important role in meeting health care provider demand for affordable malpractice insurance. Thus, NRS 690B.210 defines ''[c]laims-made policy'' as ''professional liability insurance [for health care providers] that provides coverage only for claims that arise from incidents or events which occur while the policy is in force and which are reported to the insurer while the policy is in force.'' Such coverage is valid subject to the insurer complying with NRS 690B.200 through NRS 690B.370. Williams makes no argument that PIC or its policy violated Nevada law or public policy.

B. *The insuring agreement*

As this is a coverage dispute, our analysis starts with the policy's insuring agreement clause. In the PIC policy this clause is entitled ''Coverage Agreement'' and states:

> This is a claims-made policy. . . .
>
> . . . .
>
> We will pay on your behalf damages that you are legally obligated to pay because of any professional health care incident that: (i) began on or after the Retroactive Date, and (ii) arose from professional health care services provided by you . . . , and (iii) resulted in a claim that is first received by you and reported to us during the policy period pursuant to Section H.2. What To Do If You Have A Claim of this policy.

Section H.2., ''What To Do If You Have A Claim . . . ,'' spells out the specific information the insured must provide in order to report a claim:

> a. In the Event Claim is Made Against You, you must give us written notice, as soon as practicable, but in no event more than fifteen (15) days after the expiration of the policy period. In your written notice, you must include the date, time and place of the professional health care incident; a description of the professional health care services you provided; a description of the professional health care incident; the name, address and age of the claimant or plaintiff; the names of witnesses, including other treating health care providers.

Williams sent his demand letter to Dr. Ahmadi by certified mail on February 6, 2004. By its terms, the policy required Dr. Ahmadi to give PIC written notice of the Williams demand, including in the notice a description of the health care incident; its ''date, time and place''; a description of the health care services provided; and the name and contact information of the claimant and any witnesses. But Dr. Ahmadi did not notify PIC of Williams's demand, and Williams did not redirect it to PIC until months after the policy expired. By the express terms of its insuring agreement clause, the policy thus does not cover the Williams claim, because it was not reported to PIC during the policy period. *See Nat'l Union Fire Ins. Co. v. Baker & McKenzie*, 997 F.2d 305, 307-08 (7th Cir. 1993) (upholding judgment for the insurer on a claims-made-and-reported professional liability policy where the claim was made against the insured during one policy period but not reported to the insurer until later); *F.D.I.C. v. Barham*, 995 F.2d 600, 605 n.9 (5th Cir. 1993) (declining to ''read-out'' of the claims-made-and-reported policy its explicit notice requirements).

An extended reporting endorsement was available to Dr. Ahmadi that, had he purchased it, would have covered the Williams claim. Thus, when PIC wrote Dr. Ahmadi on April 2, 2004, to cancel the policy because his license had been suspended, it offered him extended reporting or ''tail'' coverage under Section C.2. of the policy, which states:

> Extended Reporting Coverage (This is an Optional Coverage).
>
> . . . .
>
> a. Extended Reporting Coverage for Cancellation or Non-Renewal
>
> If your policy is canceled or non-renewed for any reason, you have the right to purchase extended reporting coverage. If you do not purchase extended reporting coverage, you will not have coverage for claims that you first report to us after the end of the policy period, except for those claims that were first received by you during the policy period and reported to us pursuant to Section H.2. What To Do If You Have A Claim of the policy.

But the cost of this coverage was $2,862, and Dr. Ahmadi did not purchase it. Thus, the second sentence of Section C.2.a. applies: ''If you do not purchase extended reporting coverage''—Dr. Ahmadi did not—''you will not have coverage for claims that you first report to us after the end of the policy period''—*e.g.*, the Williams claim—''except for those claims that were first received by you during the policy period and reported to us pursuant to Section H.2.''—none were.[4]

[Headnote 4]

''We will not rewrite contract provisions that are otherwise unambiguous [or] 'attempt to increase the legal obligations of the parties where the parties intentionally limited such obligations.' '' *Griffin*, 122 Nev. at 483, 133 P.3d at 254 (quoting *Senteney v.*

---

[4]Neither side raised a notice-prejudice argument in the district court or does so on appeal. *See LVMPD v. Coregis Insurance Co.*, 127 Nev. 548, 555-58, 256 P.3d 958, 963-65 (2011); *compare* Ostrager & Newman, *supra*, § 4.02[c], at 200 (''[M]any courts have declined to extend the notice-prejudice rule to claims-made policies.''), *and id.* § 4.02[b], at 168 (''Because the reporting of a claim to the insurer during the policy period is one of the essential terms of a claims-made policy, a failure to give timely notice should be less excusable under a claims-made policy than it would be under an occurrence policy.''), *with Pension Trust Fund v. Federal Ins. Co.*, 307 F.3d 944, 956-57 (9th Cir. 2002) (holding that the notice-prejudice rule does not apply to claims-made-and-reported policies because, in that context, ''notice is the event that actually triggers coverage''). We do not reach these questions here because they were neither briefed nor argued.

Fire Ins. Exchange, 101 Nev. 654, 656, 707 P.2d 1149, 1150-51 (1985)). Dr. Ahmadi did not pay for the extended reporting endorsement that would have covered the Williams claim, and it is unfair to conscript such coverage judicially. *See Continisio*, 17 F.3d at 68 (‘‘‘an extension of the notice period in a ‘‘claims made’’ policy constitutes an unbargained-for expansion of coverage, gratis, resulting in the insurance company’s exposure to a risk substantially broader than that expressly insured against in the policy’’’ (emphasis omitted) (quoting *Zuckerman v. Nat. Union Fire Ins.*, 495 A.2d 395, 406 (N.J. 1985))).

C. *Definitions section: actual and potential claims*

[Headnote 5]

Williams concedes that PIC did not receive actual notice of his demand for damages against Dr. Ahmadi while the policy was in force. Nonetheless, he persuaded the district court that the news accounts of Dr. Ahmadi’s disintegration, combined with Dr. Ahmadi’s license suspension, gave PIC constructive notice of a potential claim during the policy period and that this was enough to trigger coverage under the third alternative definition of ‘‘claim’’ that appears in the PIC policy’s definitions section. That section states:

> Claim—means:
>
> (1) the receipt by you of a demand for damages arising from a professional health care incident, including service of suit, demand for arbitration or any other notice of legal action for damages; or
>
> (2) your transmittal to us of an oral or written report from you regarding a professional health care incident that is reasonably likely to give rise to a demand for damages; or
>
> (3) the receipt by us of an oral or written report from someone other than you regarding a professional health care incident that is reasonably likely to give rise to a demand for damages.
>
> NOTE: A claim received by you must be reported to us pursuant to Section H.2. What To Do If You Have A Claim.

In Williams’s view, a newscast or other public report of an insured’s professional misconduct—as a dentist using street cocaine to anesthetize his root canal patients would be—qualifies as a ‘‘claim’’ under subparagraph 3 above.[5] Going further, he maintains

---

[5]PIC argues that issues of fact as to causation and whether Williams’s claim is excluded by its policy’s ‘‘intentional, criminal or malicious act or omission’’ exclusion remain, if this case is not resolved on the basis of timeliness.

that the requirement that the insured report actual claims in compliance with Section H.2.a. of the policy inherently does not apply to third-party reports of potential claims which, by definition, come from ''someone other than'' the insured.

But the ''claim'' definition is not self-contained. Its key terms, ''professional health care incident'' and ''damages,'' also carry specific definitions, which convey a requirement that, for an insured's or a third-party's ''report'' of a potential ''demand for damages'' to qualify as a ''claim,'' it must include specific information about a specific wrongful act and consequent injury to a patient. Thus, the policy defines ''professional health care incident'' to mean ''any act or omission in the furnishing of professional health care services to any one person'' and ''damages'' as ''all amounts of money that are payable because of physical or mental injury, sickness or disease sustained by any person.'' The references are singular and specific, not generalized.[6] And the word ''report'' that is used in subparagraphs 2 and 3 of the ''claim'' definition, while not defined, is also used in the insuring agreement clause and the extended reporting clause in the context of a claim ''*reported* to us during the policy period pursuant to Section H.2.'' (Emphasis added.) The repeated references to ''report'' and ''reporting'' denote more in the way of formal contact between the insurer and the insured or the reporting third party than generalized newspaper notice. *Compare Continisio*, 17 F.3d at 69 (''[b]ecause notice of a claim or potential claim defines coverage under a claims-made policy . . . the notice must be given through formal claims channels''; joining ''a growing line of cases prohibiting an insured from insisting that its insurer's underwriting department sift through a renewal application and decide what should be forwarded to the claims department on the insured's behalf'' (internal quotation marks omitted)), *with* XIII Oxford English Dictionary 651 (2d ed. 1989) (defining ''report'' as ''[t]o give in or render a formal account or statement of or concerning (some matter or thing); to make a formal report on; to state (something) in such a report'').

The parties do not cite, and our research has not turned up, a published decision interpreting the precise ''claim'' definition used in the PIC policy. In allowing an insured's or a third party's report of a potential demand for damages to qualify as a ''claim,'' the PIC policy's second and third alternative definitions of ''claim'' represent a type of ''awareness'' or ''discovery'' clause, for they

---

[6]''Professional health care services'' is also a defined term. It is defined as ''any services rendered in your health care practice, as defined in the Practice Endorsement attached to this policy, provided the person rendering health care services has all licenses required to render the services, and each license is current and valid.''

''afford[ ] coverage for claims made after the policy expires if, during the policy period . . . the insurer [is put] on notice of acts/omissions/circumstances that might lead to a future claim'' or, as here, demand for damages. 3 Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds* § 11:5 (5th ed. Supp. 2012). Because ''[t]he notice requirement in a discovery clause serves to actually trigger the coverage,'' it is generally held that the insurer must receive ''actual, as opposed to constructive, notice[;] . . . absent policy language leading to a different result, a discovery clause should not be [deemed] satisfied unless the insurer was put on notice of specifics.'' *Id.* (footnote omitted).

The brief news accounts of Dr. Ahmadi's bizarre (and self-serving) explanation to the California Highway Patrol of his reason for possessing two ounces of street cocaine (if they bought his story, he would face mere possession, as opposed to trafficking, charges) did not constitute a ''report'' to PIC of an ''act or omission in the furnishing of professional health care services to any one person'' that is ''reasonably likely to give rise to a demand for damages.'' The news accounts mentioned a practice that, if actually engaged in, was illegal and wrong. However, they did not identify when the practice occurred, whether patients suffered injury as a result, and if so, who the injured patient(s) were and what their anticipated injuries might be. *Compare City of Harrisburg v. Intern. Surplus Lines Ins.*, 596 F. Supp. 954, 959-60 (M.D. Pa. 1984) (''A newspaper article written and published [about an event], intended to be read by the general public, does not'' provide adequate specifics to give notice of a claim under a claims-made policy; without more, ''the insurer would have no way of knowing that a claim for coverage was being made'' or was expected.), *aff'd*, 770 F.2d 1067 (3d Cir. 1985), *with Owatonna Clinic—Mayo Health v. Medical Protective*, 639 F.3d 806, 811 (8th Cir. 2011) (affirming judgment imposing liability on a claims-made malpractice insurer who received notice during the policy period that its insured was being investigated by the Minnesota Board of Medical Practice; in contrast to the notice in this case, the notice in *Owatonna* identified the five patients whose care the medical board was investigating and specified in fair detail the specific deviations from the standard of care and the injuries suffered by the patient seeking to impose liability on the insured doctor).

Without specifics, the news accounts of Dr. Ahmadi's disintegration differ little, analytically, from the omnibus notice the trustee of a bankrupt law firm attempted to give the firm's claims-made malpractice carrier in *Home Insurance Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 750 (7th Cir. 1989), or the hypothetical considered in *McCullough v. Fidelity & Deposit Co.*, 2 F.3d 110, 112 (5th Cir. 1993), of a claims-made insurer with notice that

its insured attorney is a free spirit who has abandoned calendaring. In neither instance are there enough specifics provided to qualify as a report of a potential demand for damages under the policy's discovery clause. As Chief Judge Easterbrook wrote in rejecting the bankruptcy trustee's blanket notice of law firm incompetence as insufficient under the policy's discovery clause, ''If the trustee had reason to believe that the firm's work *in a given case* would lead to liability, it was entitled under the policy to inform the insurer within the period of coverage and so ensure indemnity if the potential came to pass.'' *Home Ins. Co. v. Cooper & Cooper*, 889 F.2d at 750 (emphasis added). But ''[a]n effort to lodge claims on everything, to extend indefinitely the coverage of a 15-month policy, has no similar effect; it is merely vexatious.'' *Id.*; *accord McCullough*, 2 F.3d at 112 (''if notice that an insured attorney has a poor docket control system is accepted as coverage triggering notice of the attorney's wrongful act, the attorney's malpractice coverage would be triggered for any number of suits predicated on missed deadlines,'' which is an unreasonable interpretation of a claims-made policy's discovery clause; the insurer must receive ''notice of specified wrongful acts to trigger coverage'').

[Headnotes 6, 7]

''[A]llowing coverage to be triggered by broadly phrased, innocuous, or non-specific statements, would permit an unbargained-for expansion of the policy, undermining the key distinguishing characteristic of a claims made policy—reduced exposure for the insurer and lower premiums for the insured.'' *Sigma Financial v. American Intern. Specialty*, 200 F. Supp. 2d 710, 718 (E.D. Mich. 2002); *see California Union Ins. v. American Diversified Sav.*, 914 F.2d 1271, 1274-75 (9th Cir. 1990) (''The term 'claim' should not be interpreted so broadly as to include a regulatory agency's request of the insured to comply with regulations where, as here, the agency did not directly threaten [the insured] with liability.''); *KPFF, Inc. v. California Union Ins. Co.*, 66 Cal. Rptr. 2d 36, 45 (Ct. App. 1997) (''Reports based upon speculation or rumor do not rise to the level of notice of a claim under the awareness [or discovery] provision.'').[7]

[Headnote 8]

For a ''report'' of a potential demand for damages to qualify as a ''claim'' requires sufficient specificity to alert the insurer's claim

---

[7]Williams suggests that PIC's knowledge of Dr. Ahmadi's misconduct imposed a duty to investigate that would have led it to the Williams claim, since Williams was part of the Nevada State Board of Dental Examiners investigation. As *KPFF* recognizes, however, the duty to investigate is an extension of the duty of good faith and fair dealing that the insurer owes its insured and, in a claims-made-and-reported policy, extends to the handling of reported claims, not claims that the insurer might unearth. *KPFF*, 66 Cal. Rptr. 2d at 45.

department to the existence of a potential demand for damages arising out of an identifiable incident, involving an identified or identifiable claimant or claimants, with actual or anticipated injuries. This interpretation harmonizes the claim definition with the other provisions of the policy, including its insuring agreement clause, *reprinted supra* section II.B, which requires the insured to provide specifics concerning an actual claim for coverage to attach. *See Mut. Real Estate Holdings, LLC v. Houston Cas. Co.*, No. 10-cv-236-LM, 2011 WL 3841931, at *5 (D.N.H. Aug. 30, 2011) (''Ignoring the 'Insuring Agreement' section is not a reasonable way to interpret [a claims-made] policy.'').[8] While an ambiguous term in an insurance policy is construed against the insurer, the term ''should not be viewed standing alone, but rather in conjunction with the policy as a whole.'' *Fourth St. Place v. Travelers Indem. Co.*, 127 Nev. 957, 963, 270 P.3d 1235, 1239 (2011). So read, we do not find an ambiguity that would permit us to construe the PIC policy to have been triggered by the public information provided PIC in this case.

We therefore reverse and remand with instructions to enter summary judgment in favor of PIC.

CHERRY, C.J., and GIBBONS, J., concur.

---

[8]Because we resolve this case on the basis that the information provided was insufficiently specific to constitute a ''claim,'' and because the parties do not argue the issue, it is unnecessary to decide whether the report of a potential claim, *i.e.*, the occurrence notice, must be followed by notice of the actual claim, as the insuring agreement clause suggests. This issue has divided other courts and remains open. *Compare Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 369 (7th Cir. 1990) (rejecting the argument that the ''occurrence notice and claim notice'' provisions of a claims-made-and-reported policy ''are alternative rather than sequential requirements'' as ''contrary to the language and evident purpose of the [policy's express reporting] requirements. The insurer wants to know whether there is a possibility that it will be receiving a claim after the policy period, but of course it also wants to receive notice of that claim when and if it materializes.''), *with Continental Ins. Co. v. Metro-Goldwyn-Mayer, Inc.*, 107 F.3d 1344, 1347 (9th Cir. 1997) (insureds were not required to give notice of an actual claim against them if they had given sufficient notice of the specific wrongful act that could lead to a claim under a discovery or awareness provision).

THE STATE OF NEVADA, APPELLANT, *v.*
GREGORY DEAN BARREN, RESPONDENT.

No. 57115

June 28, 2012 279 P.3d 182

Appeal from a district court order granting a petition for a writ of mandamus and directing the justice court to dismiss a criminal complaint for lack of jurisdiction. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Defendant was charged with category A or B felonies that he allegedly committed when he was 17 years old. The justice court transferred the case to the juvenile court, which determined that it lacked jurisdiction because the State did not file a petition with the juvenile court before defendant turned 21 years of age. The case was transferred back, and the justice court concluded that it had jurisdiction pursuant to a recently enacted statute. Defendant filed a petition for a writ of mandamus. The district court granted the petition and remanded the case to the justice court to dismiss for lack of jurisdiction. The State appealed. The supreme court, HARDESTY, J., held that the juvenile court's jurisdiction was determined on the date when the State initiated proceedings against defendant, not the date when defendant allegedly committed his offenses, and thus, under a statute in effect when the State brought charges against defendant, the juvenile court lacked jurisdiction.

Reversed and remanded.

[Rehearing denied September 27, 2012]

[En banc reconsideration denied November 28, 2012]

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *J. Patrick Burns*, Deputy District Attorney, Clark County, for Appellant.

Philip J. Kohn, Public Defender, and *Amy A. Feliciano*, Deputy Public Defender, Clark County, for Respondent.

1. MANDAMUS.
   The supreme court generally reviews a district court's grant or denial of mandamus writ relief for an abuse of discretion; however, when the writ involves questions of statutory construction, including the meaning and scope of a statute, the supreme court reviews the decision de novo.
2. CRIMINAL LAW.
   Some court always has jurisdiction over a criminal defendant. NRS 171.010.
3. COURTS; INFANTS.
   Juvenile court system is a creation of statute, and it possesses only the jurisdiction expressly provided for it by statute. NRS 62B.330(1).

4. STATUTES.
   Statutes conferring or ousting jurisdiction that speak to the power of the court rather than to the rights or obligations of the parties generally do not raise concerns about retroactivity.
5. INFANTS; STATUTES.
   Statutory provision that the juvenile court does not have jurisdiction over a person who commits a class A or B felony between 16 and 18 years of age but is not identified until after reaching 21 years of age is jurisdictional and, thus, does not raise concerns about retroactivity.
6. INFANTS.
   Jurisdiction of the juvenile court over defendant was determined on the date when the State initiated proceedings against defendant, not the date when defendant allegedly committed his offenses, and thus, under a statute in effect when the State brought charges against defendant, the juvenile court lacked jurisdiction; defendant allegedly committed category A or B felonies when he was 17 years old but was not identified as the person who committed the offenses until he was 21 years old, and such acts were deemed by the statute to not be delinquent acts. NRS 62B.330(3)(e)(2).

Before CHERRY, C.J., PICKERING and HARDESTY, JJ.

OPINION

By the Court, HARDESTY, J.:

In this opinion, we address the applicability of NRS 62B.330(3)(e)(2), a statutory provision that divests a juvenile court of jurisdiction over a person who commits a class A or B felony between 16 and 18 years of age but is not identified until after reaching 21 years of age. We conclude that this statutory provision governs jurisdiction over any proceedings initiated after the provision went into effect on October 1, 2009, regardless of when the offense was committed. *See* 2009 Nev. Stat., ch. 25, § 3, at 50-51; NRS 218D.330. Here, respondent Gregory Barren allegedly committed class A and B felonies at 17 years of age but was not identified until after reaching 21 years of age. Because NRS 62B.330(3)(e)(2) was in effect when the State initiated proceedings against Barren, we conclude that the district court,[1] not the juvenile court, has jurisdiction over his criminal case.

---

[1]Barren's alleged crimes are not triable in justice court. *See* NRS 4.370(3). Thus, if the juvenile court is divested of jurisdiction, the justice court's role would be to hold a probable cause hearing. NRS 171.196. If Barren waives this hearing, his alleged crimes will be tried in the district court. *Id*. If the hearing is not waived, and probable cause is found, Barren's alleged crimes would likewise be tried in the district court. NRS 171.206; *see also Woerner v. Justice Court*, 116 Nev. 518, 525, 1 P.3d 377, 381-82 (2000). Accordingly, throughout this opinion we refer to the jurisdiction of the district court rather than the justice court.

FACTS AND PROCEDURAL HISTORY

In 2005, a woman was kidnapped and sexually assaulted.[2] Police collected a sample of the offender's DNA from bodily fluid left at the scene. Subsequently, the police entered the offender's DNA into the Combined DNA Index System and, in July 2009, the system identified Barren as the perpetrator. Barren was 17 years old when he allegedly committed the offenses and 21 years old at the time he was identified. On October 28, 2009, the State brought charges against Barren in justice court for first-degree kidnapping with the use of a deadly weapon, sexual assault with the use of a deadly weapon, and attempted sexual assault with the use of a deadly weapon. Each charge against Barren is a category A or B felony if committed by an adult. NRS 200.320; NRS 200.366; NRS 193.330(1)(a)(1).

The justice court transferred the case to the juvenile court, but the juvenile court found that it lacked jurisdiction over Barren's case because the State did not file a petition with the juvenile court before Barren turned 21 years of age. Barren's case was subsequently transferred back to the justice court. The justice court concluded that it had jurisdiction because of newly enacted NRS 62B.330(3)(e)(2), a provision which divests a juvenile court of jurisdiction over a person who committed a category A or B felony between 16 and 18 years of age, but ''is not identified by law enforcement as having committed the offense until the person reaches 21 years of age.'' Specifically, the justice court concluded that the statutory provision applied to the facts of Barren's case, and that ''[a]fter October 1, 2009, the Juvenile Court 'does not have jurisdiction' over the persons described in NRS 62B.330(3)(e)(2).'' The justice court further found that applying NRS 62B.330(3)(e)(2) did not constitute an ex post facto violation because based on Barren's age, ''he would not have been subject to juvenile court jurisdiction [even] prior to the [2009 amendment to NRS 62B.330].'' ''As a result, jurisdiction would have defaulted to the adult trial court.'' The justice court also noted that even absent the 2009 amendments, the Nevada Constitution and caselaw require that some court, district or juvenile, must always have jurisdiction over a criminal defendant.

Subsequently, Barren filed a petition for a writ of mandamus in the district court and requested that the district court order the justice court to dismiss the case for lack of jurisdiction. After a hearing, the district court granted Barren's writ petition and re-

[2]The documents containing the specific facts surrounding this incident have been stricken from the record on appeal as they were never filed in the district court. However, the stricken documents are irrelevant to the disposition of this case.

manded Barren's case to the justice court to dismiss for lack of jurisdiction. The district court reasoned that NRS 62B.330(3)(e)(2) could not apply retroactively, and if it did, that retroactive application would constitute an ex post facto violation. The State appeals.[3]

DISCUSSION

[Headnote 1]

This court ''generally review[s] a district court's grant or denial of writ relief for an abuse of discretion.'' *Koller v. State*, 122 Nev. 223, 226, 130 P.3d 653, 655 (2006). ''However, when the writ involves questions of statutory construction, including the meaning and scope of a statute, [this court] review[s] the decision de novo.'' *Id*. Because resolving the issues in this appeal presents a question of law, the standard of review is de novo. *Paige v. State*, 116 Nev. 206, 208, 995 P.2d 1020, 1021 (2000).

[Headnote 2]

At the outset, we note that notwithstanding exceptions inapplicable here, some court always has jurisdiction over a criminal defendant. *See* NRS 171.010 (''Every person, whether an inhabitant of this state, or any other state, or of a territory or district of the United States, is liable to punishment by the laws of this state for a public offense committed therein, except where it is by law cognizable exclusively in the courts of the United States.''); *see also Castillo v. State*, 110 Nev. 535, 542, 874 P.2d 1252, 1257 (1994) (rejecting a defendant's claim that he was ''home free'' from any court's jurisdiction), *disapproved of on other grounds by Wood v. State*, 111 Nev. 428, 430, 892 P.2d 944, 946 (1995); *D'Urbano v. Commonwealth*, 187 N.E.2d 831, 835 (Mass. 1963) (holding that ''[t]he absence of valid juvenile procedures did not deprive the Superior Court of jurisdiction'' and noting that ''[t]he statute [did] not intend, for example, that a person who committed murder at [16] and is apprehended at [23] should be beyond the reach of criminal statutes''); *State ex rel. Elliot v. District Court*, 684 P.2d 481, 485 (Mont. 1984) (''[L]ack of jurisdiction in Youth Court does not limit a district court's jurisdiction.''); *Trujillo v. State*, 447 P.2d 279, 280 (N.M. 1968) (explaining that the district court had jurisdiction to try the defendant because he was over 21 years of age and ''the district court is one of general jurisdiction,'' while the juvenile court is limited, by statute, to persons less than 21 years of age); *State v. Hodges*, 63 P.3d 66, 68-69 (Utah 2002) (noting that a statute that gave a juvenile court jurisdiction in proceedings over a person younger than 21 years of age did ''not limit

[3]In response to a motion from the State, this court has granted a stay of the district court's order and the proceedings in the justice court pending a resolution of this appeal.

the general grant of jurisdiction made to the district court . . . so as to preclude its jurisdiction over proceedings against persons [21] years of age or older''); *State v. Bradley*, 580 P.2d 640, 642 (Wash. Ct. App. 1978) (''Want of jurisdiction of the juvenile court merely precludes acts of that court. It does not invalidate an otherwise valid act of the superior court which properly had jurisdiction of the subject matter and the person.''). Thus, the issue on appeal is not *whether* a court has jurisdiction over Barren, but rather, *which* court has jurisdiction over Barren.

[Headnote 3]

The Nevada Constitution grants the district court ''original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts'' and ''final appellate jurisdiction in cases arising in Justice Courts and such other inferior tribunals as may be established by law.'' Nev. Const. art. 6, § 6(1). This court has explained that a district court has jurisdiction over ''all criminal cases except as otherwise provided by law.'' *Battiato v. Sheriff*, 95 Nev. 361, 362, 594 P.2d 1152, 1153 (1979). Conversely, ''the juvenile court system is a creation of statute, and it possesses only the jurisdiction expressly provided for it in the statute.'' *Kell v. State*, 96 Nev. 791, 792-93, 618 P.2d 350, 351 (1980); *see also State v. Bill*, 91 Nev. 275, 277, 534 P.2d 1264, 1265 (1975) (''The Juvenile Court Act's grant of exclusive and original jurisdiction is limited . . . .''). To determine which court has jurisdiction in this instance, we examine the statutory scope of a juvenile court's jurisdiction.

By statute, ''the juvenile court has exclusive original jurisdiction over a *child* living or found within the county who is alleged or adjudicated to have committed a *delinquent act*.'' NRS 62B.330(1) (emphases added). NRS 62A.030(1)(b) defines a ''child,'' *inter alia*, as ''[a] person who is less than 21 years of age and subject to the jurisdiction of the juvenile court for an unlawful act that was committed before the person reached 18 years of age.'' NRS 62B.330(3) limits the otherwise broad definition of ''delinquent act'' by listing acts that are not considered to be ''delinquent acts'' and are therefore not within the juvenile court's exclusive original jurisdiction.[4] Significantly, as amended in 2009, NRS

[4]Prior to the 2009 amendments, NRS 62B.330(3) excluded from the juvenile court's jurisdiction cases involving a child who committed (1) murder or attempted murder; (2) sexual assault, attempted sexual assault, or an offense with the use or threatened use of a firearm, if the person was at least 16 years of age and had already been adjudicated delinquent for a previous felonious act; or (3) a felony resulting in death or substantial bodily harm if committed with a weapon at a school. *See* 2009 Nev. Stat., ch. 25, § 3, at 50-51. The 2009 amendments to NRS 62B.330(3) did not alter these exclusions. Because these acts are excluded from the juvenile court's jurisdiction and they fall within the district court's original jurisdiction, the district court has jurisdiction over these offenses even when they are committed by a child.

62B.330(3)(e)(2) expressly excludes from the juvenile court's jurisdiction cases such as Barren's:

> For the purposes of this section, each of the following acts shall be deemed not to be a delinquent act, and the juvenile court does not have jurisdiction over a person who is charged with committing such an act:
>
> . . . .
>
> (e) A category A or B felony and any other related offense arising out of the same facts as the category A or B felony, regardless of the nature of the related offense, if the person was at least 16 years of age but less than 18 years of age when the offense was committed, and:
>
> . . . .
>
> (2) The person is not identified by law enforcement as having committed the offense until the person reaches 21 years of age.

The parties dispute whether NRS 62B.330(3)(e)(2) governs jurisdiction in this case, because it did not go into effect until after the date Barren allegedly committed the offenses. The relevant inquiry, thus, is whether juvenile court jurisdiction is determined on the date when the State initiated the proceedings or on the date when Barren allegedly committed the offenses.

[Headnotes 4, 5]

The parties focus on whether NRS 62B.330(3)(e)(2) is retroactive, but a retroactivity analysis is unnecessary because NRS 62B.330(3)(e)(2) is a jurisdictional statute.[5] ''[S]tatutes 'conferring or ousting jurisdiction' that 'speak to the power of the court rather than to the rights or obligations of the parties' generally do not raise concerns about retroactivity.'' *Henry v. Ashcroft*, 175 F. Supp. 2d 688, 693 (S.D.N.Y. 2001) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994)). Application of ''a jurisdiction-conferring or jurisdiction-stripping statute usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' '' *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006) (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). ''Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' '' *Landgraf*, 511 U.S. at

---

[5]We have previously held in regard to penal statutes that '' 'the general rule is that the proper penalty is that in effect at the time of the commission of the offense' unless the Legislature demonstrates clear legislative intent to apply a criminal statute retroactively.'' *State v. Dist. Ct. (Pullin)*, 124 Nev. 564, 569, 188 P.3d 1079, 1082 (2008) (quoting *Sparkman v. State*, 95 Nev. 76, 82, 590 P.2d 151, 155-56 (1979)). However, this principle is inapposite here because NRS 62B.330(3)(e)(2) does not impose a penalty; rather, it merely explains which court has jurisdiction.

274 (quoting *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). Thus, ''no retroactivity problem arises because the change in the law does not 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.' '' *Id.* at 577 (quoting *Landgraf*, 511 U.S. at 280).

Additionally, many courts have held that '' '[t]he jurisdiction of the juvenile court does not depend on the defendant's age at the time the criminal act was committed, but [on] his age at the time judicial proceedings were initiated.' ''[6] *State v. Godines*, 236 P.3d 824, 829 (Or. Ct. App. 2010) (second alteration in original) (quoting *Delaney v. State*, 648 P.2d 1302, 1303 (Or. Ct. App. 1982)); *see also Boyett v. State*, 487 S.W.2d 357, 358 (Tex. Crim. App. 1972); *Pruitt v. Guerry*, 170 S.E.2d 1, 3 (Va. 1969); *State v. Dion*, 159 P.3d 404, 405 (Wash. 2007). For example, in *State v. Little*, the Supreme Court of Oregon considered a statute which provided ''that a child may be remanded to the appropriate trial court for disposition as an adult if at the time of the remand he is [16] years of age or older.'' 407 P.2d 627, 628-29 (Or. 1965) (internal quotations omitted). The defendant in that case argued that all offenders who committed offenses before reaching 16 years of age should be treated ''as delinquent children instead of as criminals,'' regardless of their age at the time of remand. *Id.* at 629. The court held that determining a juvenile court's jurisdiction based on the offender's age at the time of the offense ''would create an absurd result.'' *Id.* at 630. Such a rule ''would make it possible for a person to commit any number of dangerous felonies a few days before his sixteenth birthday and then, by evading arrest until he is [21],

---

[6]Other courts have held that jurisdiction is determined by a defendant's age at the time of the offense, *see* H.D. Warren & C.P. Jhong, Annotation, *Age of Child at Time of Alleged Offense or Delinquency, or at Time of Legal Proceedings, as Criterion of Jurisdiction of Juvenile Court*, 89 A.L.R.2d 506 (1963) (collecting cases), but such cases are distinguishable. For example, the Court of Appeals of Georgia concluded that a defendant's ''age at the time of his adjudicatory hearing is not determinative of the juvenile court's jurisdiction over him. Rather, his age at the time of the offense controls.'' *In re J.T.D.*, 529 S.E.2d 377, 378 (Ga. Ct. App. 2000). However, the statute upon which the court relied defined ''child'' as ''an individual under the age of 21'' who committed an offense as a juvenile. *Id.* (citing Ga. Code Ann. § 15-11-2(2)(B)). Because the defendant was 17 years old at the time of the hearing, the court did not address whether its holding would apply to a 21-year-old. *Id.* And, the Court of Appeals of Maryland noted that ''[a] juvenile court may still retain jurisdiction over a person who has committed a criminal offense before the age of 18,'' and that the age of the person at the time of the offense controls jurisdiction. *Whaley v. State*, 974 A.2d 951, 963 n.19 (Md. Ct. Spec. App. 2009). However, the court found it significant that the defendant was ''still under the age of 21'' at the time of the proceedings. *Id.* It further noted that a juvenile court's ''jurisdiction continues until [a] person reaches 21 years of age.'' *Id.*

escape both corrective measures as a juvenile and punishment as an adult.'' *Id.* (footnote omitted). Under such a rule, ''a person [could] commit crimes before his sixteenth birthday, happy in the knowledge that his worse fate, if caught, [would] be a brief period of treatment as a delinquent child.'' *Id.* (also noting that ''[i]t [was] extremely unlikely that if the Assembly had considered the precise problem [at issue], it would have intended to create a hiatus in the law that could wholly frustrate the administration of justice when a serious offense has been committed by a person below the age for discretionary remand'').

Similarly, in *State v. Hodges*, the Supreme Court of Utah analyzed whether a district court would have jurisdiction over a 21-year-old defendant who was a juvenile at the time of the alleged offenses. 63 P.3d 66, 67-68 (Utah 2002). The statute at issue granted a juvenile court exclusive jurisdiction over '' 'a person younger than 21 years of age' '' who violated a law as a juvenile. *Id.* at 68-69 (quoting Utah Code Ann. § 78-3a-104(1)(a) (1996 & Supp. 2002)). The court reasoned that based on the statute, juvenile jurisdiction is determined ''according to the age of those persons at the time proceedings are commenced.'' *Id.* at 69. To conclude that the statute ''gives the juvenile court exclusive jurisdiction over all offenses committed by minors, regardless of the age of the person when the proceedings are commenced, would render the language concerning proceedings against persons younger than [21] years of age superfluous.'' *Id.* Accordingly, the court affirmed the district court's order that it had jurisdiction over the proceedings. *Id.* at 70.

In Nevada, NRS 62B.410(2) limits a juvenile court's jurisdiction to persons less than 21 years of age, and NRS 62B.330(1) similarly limits the juvenile court to having jurisdiction over a ''child,'' which NRS 62A.030 defines, in relevant part, as ''[a] person who is less than 21 years of age.'' Similar to the reasoning in *Hodges*, to conclude that the Nevada Revised Statutes give ''the juvenile court exclusive jurisdiction over all offenses committed by minors, regardless of the age of the person when the proceedings are commenced, would render the language concerning proceedings against persons younger than [21] years of age superfluous.'' 63 P.3d at 69. Moreover, from the very day it went into effect, NRS 62B.330(3)(e) applied to offenses that had already been committed, divesting a juvenile court of jurisdiction ''if the person *was* at least 16 years of age but less than 18 years of age, when the offense *was committed*.'' (Emphases added). Determining jurisdiction at the time of the offense would ''create an absurd result'' contrary to the plain language of NRS 62B.330(3)(e). *Little*, 407 P.2d at 630.

[Headnote 6]

Based on these considerations, we conclude that jurisdiction in this case is determined on the date when the State initiated pro-

ceedings against Barren rather than the date when Barren allegedly committed the offenses. At the time the State initiated the proceedings against Barren, NRS 62B.330(3)(e)(2), the statute governing jurisdiction, was in effect, and the juvenile court did not have jurisdiction.[7] Accordingly, we reverse the district court's judgment and remand.[8]

CHERRY, C.J., and PICKERING, J., concur.

IN THE MATTER OF GEORGE J., A MINOR.

GEORGE J., APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 57233

June 28, 2012 279 P.3d 187

Appeal from a district court order transferring a juvenile case for adult criminal proceedings. Eighth Judicial District Court, Family Court Division, Clark County; William O. Voy, Judge.

The State filed a delinquency petition against defendant when he was 20 years, 10 months old, alleging that defendant, when he was 17 years old, committed acts that could be a category A or B felony if committed by an adult. The State identified defendant as the alleged perpetrator when he was 20 years, 8 months old. He was not apprehended until he was 21 years old. The district court transferred the case for adult criminal proceedings. Defendant appealed. The supreme court, HARDESTY, J., held that the acts allegedly committed by defendant were not delinquent acts and, therefore, were not within the juvenile court's jurisdiction.

Affirmed.

[Rehearing denied September 27, 2012]

[En banc reconsideration denied November 28, 2012]

Philip J. Kohn, Public Defender, and *Susan Deems Roske*, Deputy Public Defender, Clark County, for Appellant.

---

[7]Barren argues that the State intentionally waited to file charges until NRS 62B.330(3)(e)(2) went into effect. There is insufficient evidence in the record before us to support Barren's argument. Additionally, as discussed above, some court would have jurisdiction over Barren regardless of when the State initiated proceedings.

[8]Although the parties argue whether retroactive application would constitute an ex post facto violation, we need not reach that issue because we conclude that a retroactive application of the statute is unnecessary.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Mary D. Brown*, Chief Deputy District Attorney, and *Nicole J. Cannizzaro*, Deputy District Attorney, Clark County, for Respondent.

1. STATUTES.
   Construction of a statute is a question of law that the supreme court reviews de novo.
2. STATUTES.
   When interpreting a statute, the supreme court first examines the statute's plain language to determine the Legislature's intent behind the statute.
3. STATUTES.
   The supreme court avoids statutory interpretation that renders language meaningless or superfluous.
4. STATUTES.
   If a statute's language is clear and unambiguous, the supreme court will enforce the statute as written.
5. STATUTES.
   The supreme court will interpret a rule or statute in harmony with other rules and statutes.
6. INFANTS.
   A person who commits a category A or B felony and related offenses when the person was between 16 and 18 years of age but who is not identified and charged before 20 years, 3 months of age would be excluded from the juvenile court's jurisdiction because those acts would not be deemed to be delinquent acts. NRS 62B.330(1), (3)(e)(1).
7. INFANTS.
   Statute governing jurisdiction over an adult charged with certain delinquent acts committed as a child applies only to delinquent acts and therefore does not apply to acts that are deemed by another statute to not be delinquent acts; thus, if a case is excluded from the juvenile court's jurisdiction under the latter statute, the juvenile court cannot obtain jurisdiction by virtue of the former statute. NRS 62B.330(3), 62B.335.
8. INFANTS.
   Acts allegedly committed by defendant were not delinquent acts and, therefore, were not within juvenile court's jurisdiction; defendant allegedly committed the acts when he was 17 years of age, the acts would have been category A or B felonies if committed by an adult, and defendant was identified and charged when he was between the ages of 20 years, 3 months and 21 years. NRS 62B.330(3).

Before CHERRY, C.J., PICKERING and HARDESTY, JJ.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we analyze the relationship between two statutory provisions, enacted in 2009, that govern the extent of the juvenile court's jurisdiction: NRS 62B.330(3)(e)(1) and NRS 62B.335. Both provisions address a person who has been charged with com-

mitting an offense when the person was between 16 and 18 years of age that would be a category A or B felony if committed by an adult. In those circumstances, NRS 62B.330(3)(e)(1) provides that the act is not a ''delinquent act'' and divests the juvenile court of jurisdiction if the person is identified and charged between the ages of 20 years, 3 months and 21 years. Pursuant to NRS 62B.335, if a person charged with a delinquent act that would have been a category A or B felony if committed by an adult is identified before reaching 21 years of age but is not apprehended until after reaching 21 years of age, then the juvenile court retains jurisdiction to conduct a hearing. The purpose of the hearing authorized under NRS 62B.335 is to determine whether to dismiss the charges or transfer the case to district court for criminal proceedings. NRS 62B.335(3), (4).

Reading the statutes together, we conclude that NRS 62B.335 only applies to delinquent acts and therefore does not apply to acts that are ''deemed not to be a delinquent act'' under NRS 62B.330(3). Thus, if the case is excluded from the juvenile court's jurisdiction under NRS 62B.330(3), then the juvenile court does not obtain jurisdiction by virtue of NRS 62B.335. Here, the juvenile court lacked jurisdiction under NRS 62B.330(3)(e)(1). We nonetheless affirm because the juvenile court reached the correct result by transferring the case to the district court for adult criminal proceedings.

FACTS AND PROCEDURAL HISTORY

In January 2007, when appellant George J. was 17 years of age, he allegedly committed the following acts: (1) home invasion, (2) burglary, (3) grand larceny, (4) grand larceny of an automobile, and (5) burglary of an automobile. Each of these acts could be a category A or B felony if committed by an adult. *See generally* NRS Chapter 205. In February 2010, when George was 20 years, 8 months of age, the State identified him as the alleged perpetrator through latent fingerprints retrieved from an exterior window at the scene of the crime. In April 2010, when George was 20 years, 10 months of age, the State filed a delinquency petition against him in the juvenile court. In June 2010, George turned 21 years of age. In August 2010, George, who was in custody on other charges, was apprehended when he was served with the outstanding arrest warrant for the charges in the petition.

In the proceedings before the juvenile court, the State and George disputed the applicability of newly enacted NRS 62B.330(3)(e)(1) and NRS 62B.335(1). George argued that while NRS 62B.335 was better-suited to the facts of his case, it did not apply because it was not in effect at the time that he allegedly committed the offenses. He further argued that NRS 62B.335 could not

apply retroactively and that retroactive application of that statute would constitute an ex post facto violation. Conversely, the State argued that NRS 62B.330 governed this case and thereby divested the juvenile court of jurisdiction. The juvenile court determined that NRS 62B.335 applied to George's case. It further concluded that there was probable cause to believe that George committed the alleged offenses, and it transferred George's case to the justice court for criminal proceedings. George appeals.

DISCUSSION

This appeal presents a single issue for our review: the resolution of the apparent contradiction between NRS 62B.330 and NRS 62B.335 governing the jurisdiction of the juvenile court.[1] On appeal, the State maintains that NRS 62B.330(3)(e)(1) governs this case and divests the juvenile court of jurisdiction over George, thereby leaving jurisdiction in the district court.[2] Conversely, George argues that if any statute governs jurisdiction, it is NRS 62B.335. Specifically, he argues that ''[r]ead in its entirety, it is quite clear that the [L]egislature intended NRS [ ]62B.335 to apply [to] all individuals excluded pursuant to NRS [ ]62B.330(3)(e) and apprehended after their 21st birthday.''

[Headnotes 1-5]

'' 'The construction of a statute is a question of law that this court reviews de novo.' '' *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 533, 245 P.3d 1149, 1153 (2010) (quoting *A.F. Constr. Co. v. Virgin River Casino*, 118 Nev. 699, 703, 56 P.3d 887, 890 (2002)). When interpreting a statute, this court first examines its plain language to determine the Legislature's intent behind the statute. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011); *see also Hobbs v. State*, 127 Nev. 234, 237,

---

[1]Because these statutes were already in effect at the time that the State initiated the proceedings, we conclude that they apply to George's case regardless of when George allegedly committed the offenses. *See State v. Barren*, 128 Nev. 337, 279 P.3d 182 (2012). Accordingly, we need not reach the parties' arguments as to whether the statutes may apply retroactively or whether retroactive application would constitute an ex post facto violation. Rather, the only issue is which statutory provision applies.

[2]George argues that the issue of which statute governs is not properly raised because the State did not raise the issue in a cross-appeal. Because the juvenile court transferred the case for adult criminal proceedings, the State is arguably not an aggrieved party and therefore could not file a cross-appeal. *See Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994) (''NRAP 3A(a) limits the right of appeal to 'part[ies] aggrieved' by a district court's decision.'' (alteration in original) (quoting NRAP 3A(a))). However, regardless of whether the State properly raised the issue, this court can sua sponte consider jurisdictional issues. *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011); *Koller v. State*, 122 Nev. 223, 228-29, 130 P.3d 653, 656 (2006).

251 P.3d 177, 179 (2011). This court ''avoid[s] statutory interpretation that renders language meaningless or superfluous,'' and ''[i]f the statute's language is clear and unambiguous, [this court will] enforce the statute as written.'' *Hobbs*, 127 Nev. at 237, 251 P.3d at 179. Likewise, this court '' 'will interpret a rule or statute in harmony with other rules and statutes,' '' *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) (quoting *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993)); *see also Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (''[T]his court considers the statute's multiple legislative provisions as a whole . . . [and will] not render any part of a statute meaningless.''). We conclude that pursuant to the plain terms of the two statutes in question here, NRS 62B.335 only applies to offenses that are not excluded from the juvenile court's jurisdiction by NRS 62B.330(3).

[Headnote 6]

While NRS 62B.330(1) grants a juvenile court exclusive original jurisdiction over a child ''who is alleged or adjudicated to have committed a delinquent act,'' NRS 62B.330(3) limits the definition of ''delinquent act'' by listing acts that are not considered to be ''delinquent'' and are therefore not within the juvenile court's exclusive jurisdiction. Such nondelinquent acts over which the juvenile court has no jurisdiction, even when committed by a child, include murder, attempted murder, sexual assault, and attempted sexual assault. NRS 62B.330(3)(a)-(b). Significantly, when amended in 2009, NRS 62B.330 further excluded from the juvenile court's jurisdiction the following nondelinquent acts:

> 3. For the purposes of this section, each of the following acts *shall be deemed not to be a delinquent act*, and the juvenile court does not have jurisdiction over a person who is charged with committing such an act:
>
> . . . .
>
> (e) A category A or B felony and any other related offense arising out of the same facts as the category A or B felony, regardless of the nature of the related offense, if the person was at least 16 years of age but less than 18 years of age when the offense was committed, and:
>
> (1) The person is not identified by law enforcement as having committed the offense and charged before the person is at least 20 years, 3 months of age, but less than 21 years of age.

NRS 62B.330(3)(e)(1) (emphasis added). Thus, a person who commits a category A or B felony and related offenses when the person was between 16 and 18 years of age but who is not identified and charged before 20 years, 3 months of age would be excluded

from the juvenile court's jurisdiction because those acts would not be deemed to be delinquent acts.

[Headnote 7]

The juvenile court's jurisdiction over a person charged with certain delinquent acts that would be a category A or B felony and occurred when the person was between the ages of 16 and 18 years of age is also addressed in NRS 62B.335. That statute gives the juvenile court jurisdiction to conduct a hearing to determine whether to dismiss charges or transfer a case to district court for criminal proceedings where a person has been charged with such offenses and was identified by law enforcement before reaching 21 years of age but was not apprehended until after 21 years of age. NRS 62B.335(1)-(4). But the statute applies only to a *delinquent act* that also meets the requirements set forth in the statute as to the nature of the offense and the age of the offender. Specifically, if:

> (a) A person is charged with the commission of a *delinquent act* that occurred when the person was at least 16 years of age but less than 18 years of age;
>
> (b) The *delinquent act* would have been a category A or B felony if committed by an adult;
>
> (c) The person is identified by law enforcement as having committed the *delinquent act* before the person reaches 21 years of age; and
>
> (d) The person is apprehended by law enforcement after the person reaches 21 years of age,
>
> the juvenile court has jurisdiction over the person to conduct a hearing and make the determinations required by this section in accordance with the provisions of this section.

NRS 62B.335(1) (emphases added). By its terms, NRS 62B.335(1) only applies to delinquent acts. This terminology is consistent with NRS 62B.330, which provides that the juvenile court has jurisdiction over a child who commits a delinquent act and defines certain acts that are not delinquent acts and therefore are not within the juvenile court's jurisdiction. NRS 62B.335 therefore can never apply to acts that NRS 62B.330(3) ''deem[s] not to be a delinquent act'' because those acts are not within the juvenile court's jurisdiction. Otherwise, NRS 62B.335 would circumvent NRS 62B.330(3) and grant a juvenile court jurisdiction to transfer or dismiss other acts that are deemed not to be delinquent acts under NRS 62B.330(3), such as murder or sexual assault, provided that the requirements set forth in NRS 62B.335(1) are met. Reading NRS 62B.335 in this way would create an absurd result, which this court seeks to avoid. *Pellegrini v. State*, 117 Nev. 860, 874, 34 P.3d 519, 528-29 (2001) (explaining that this court ''construe[s] statutory language to avoid absurd or unreasonable results, and,

if possible, we will avoid any interpretation that renders nugatory part of a statute''). Therefore, reading NRS 62B.330(3) and NRS 62B.335 in ''harmony'' with each other, *Albios*, 122 Nev. at 418, 132 P.3d at 1028 (internal quotations omitted), and ''not render[ing] nugatory part of [either] statute,'' *Pellegrini*, 117 Nev. at 874, 34 P.3d at 529, we conclude that NRS 62B.335 applies only to cases that are within the juvenile court's jurisdiction under NRS 62B.330. Thus, if the juvenile court lacks jurisdiction pursuant to NRS 62B.330(3), it does not then obtain jurisdiction by virtue of NRS 62B.335.

[Headnote 8]

We now consider whether NRS 62B.330(3)(e)(1) applies to George's case. George allegedly committed the delinquent acts when he was 17 years of age, the delinquent acts would have been category A or B felonies if committed by an adult, and George was identified and charged when he was between the ages of 20 years, 3 months and 21 years. Under these circumstances, the charged acts are not delinquent acts and are therefore not within the juvenile court's jurisdiction. NRS 62B.330(3)(e)(1). Accordingly, the juvenile court erred when it determined that NRS 62B.335 granted it jurisdiction in this case. However, because the juvenile court ultimately reached the correct result by transferring the case to the district court, we affirm.[3] *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (''If a judgment or order of a [lower] court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.'').

CHERRY, C.J., and PICKERING, J., concur.

---

[3]Based on our disposition today, we need not reach whether the juvenile court correctly analyzed the NRS 62B.335 considerations to find probable cause.